No. 83-5954

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In the Supreme Court of the United States

OCTOBER TERM, 1983

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

JOHN MURCKO, ESQ.
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Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217
Counsel For Respondent

PETITION FOR CERTIORARI FILED DECEMBER 15, 1983.
CERTIORARI GRANTED JUNE 18, 1984.

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RELEVANT DOCKET ENTRIES

Date	*PROCEEDING*
1981	
6/10	Filed petition for review in Court of Claims
7/17	Filed record in Court of Claims
11/5	Filed petitioner's opening brief in Court of Claims
1982	
10/1	Case ordered transferred to U.S. Court of Appeal for Federal Circuit
1983	
4/11	Filed respondent's motion to dismiss petitioner's appeal
4/27	Filed petitioner's opposition to respondent's motion to dismiss petitioner's appeal
5/13	Filed respondent's reply brief
9/22	Filed decision of Court of Appeal granting respondent's motion to dismiss
9/22	Judgment filed dismissing appeal for lack of jurisdiction

EDITOR'S NOTE

PAGES 3 thru 19 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

FROM MERIT SYSTEMS PROTECTION BOARD

UNITED STATES CIVIL SERVICE COMMISSION

WAYNE LINDAHL V.
OFFICE OF PERSONNEL MANAGEMENT

DISABILITY RETIREMENT EXAMINATION

APPT: 1/30/78 1400

REPORT OF MEDICAL EXAMINATION FOR DISABILITY RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

A. IDENTIFYING INFORMATION

1. NAME OF PERSON EXAMINED		2. DATE OF BIRTH
LINDAHL, WAYNE (NMN)	Employee No. 479-18-5184	07/02/26
3. POSITION TITLE		4. CLAIM NO.
Police Officer		

B. MEDICAL HISTORY

1. COMPLAINTS

Chronic cough, shortness of breath, weakness, etc.

2. ONSET AND HISTORY OF DISABILITY

Employee states that he went to the Allergy Clinic at Kaiser in Oakland, in 1971 or 1972 because of recurrent colds, coughs, chills and fever. Since that time, he has been seen by various doctors in the Kaiser Organization and has been treated with antibiotics on a continuing basis. Currently he is on Tetracycline, but at times has been on Ampicillin. In addition, he takes at least 4 Aspirins a day and takes Contact to control sputum. He is bothered by exhaust fumes from traffic and by welding fumes and paint fumes when assigned to industrial areas. He was a Welder for 20 months and worked in the Sailloft for about 8 months since coming to work at Mare Island in 1968.

Past history includes a hospitalization for a bleeding ulcer in 1960.

C. PHYSICAL FINDINGS

Describe the clinical findings in detail as fully as possible, particularly with respect to the condition which is considered disabling. Your complete and objective report of medical examination is of the utmost importance to the Government and the person identified above.

1. HEIGHT	2. WEIGHT	3. TEMPERATURE	4. MUSCULAR DEVELOPMENT	5. PULSE	6. RESPIRATION
6' 1"	230	97.6	Good	80	20

7. NUTRITION	8. POSTURE	9. GAIT	10. GENERAL APPEARANCE	11. BLOOD PRESSURE
Good	Good	Good	Good	SYSTOLIC 130 DIASTOLIC 90

12. COMPLETE PHYSICAL FINDINGS (CONTINUE ON OTHER SIDE)

Employee is alert and orineted. He is coughing (hacking) throughout the examination.
HEENT: Negative. The thyroid is not palpable.
CHEST: Auscultation of the heart shows a regular rhythm with no murmurs.
are clear.
ABDOMEN: Soft. There are no palpable masses or organs.
GENITALIA: Negative.
EXTREMITIES: The upper and lower extremities are well developed and equal in appearance and there is a full range of motion.
SPINE: Negative.

ALSO COMPLETE REVERSE SIDE OF THIS REPORT

12. PHYSICAL FINDINGS (CONTINUED)

NEUROLOGICAL: Negative.
VISUAL ACUITY: Is corrected to 20/20 bilaterally.

(IF ADDITIONAL SPACE IS REQUIRED, PLEASE CONTINUE ON SEPARATE SHEET)

D. DIAGNOSIS

1. ACUTE AND CHRONIC BRONCHITIS.
2. WEAKNESS AND DIZZINESS.

Employee is probably disabled for his position and for any work requiring exposure to significant levels of stress or to respiratory irritants.

E. CONCLUSIONS

NOTE: Under the civil service retirement system, the term disability means disabled for useful and efficient service in the grade or class of position last occupied by the employee, by reason of disease or injury not due to vicious habits, intemperance, or willful misconduct.

1. IS EMPLOYEE DISABLED FOR THE POSITION NAMED IN PART A, ITEM 3?	2. DATE DISABILITY BEGAN?	3. HOW LONG IS DISABILITY EXPECTED TO LAST?	4. IS DISABILITY DUE TO VICIOUS HABITS, INTEMPERANCE OR WILLFUL MISCONDUCT?
[XX] YES [ ] NO	Present	Indefinite	[ ] YES [XX] NO

F. PHYSICIAN'S NAME AND ADDRESS

1. TYPE OR PRINT PHYSICIAN'S NAME	2. PHYSICIAN'S SIGNATURE
JOHN P. WILLIAMS, M. D.	[signature]
3. PHYSICIAN'S ADDRESS (Including ZIP Code) [illegible] DISPENSARY [illegible] DEPARTMENT [illegible] ISLAND NAVAL SHIPYARD [illegible] CALIFORNIA 945[illegible]	4. DATE February 13, 1978

FROM MERIT SYSTEMS PROTECTION BOARD

M.R. #1598322

KAISER PERMANENTE MEDICAL CENTER

DISCHARGE SUMMARY

NAME: LINDAHL, Wayne

B. ALLAN, M.D.

ADMITTED: 1/23/79
DISCHARGED: 2/1/79

Admitted through Emergency because of a feeling of chest pressure and pain diffusely over the whoe of his anterior chest, beginning at 7:00 PM on the night of admission and continuing for about 12 hours. There was mild malaise and a little sweating and nausea with the pain but no faintness. He has given a history of similar chest oppression over the last few months, more moderately over the last week.

PAST HISTORY: Severe chronic recurring bronchitis attributable probably to his exposure to chemical fumes, etc. at Mare Island Naval Shipyards. He has had various neurotic episodes and anxiety attacks, bleeding peptic ulcer in 1960 requiring transfusion, kidney stone a long time ago, and probably chronic depression.

Medications—he takes Ampicillin or Tetracycline on a prn basis for his bronchitis.

PHYSICAL EXAMINATION: Patient, apart from his usual depressed appearance, has little to find.

TREATMENT AND PROGRESS IN HOSPITAL: He was observed in hospital, has various episodes of chest pressure and some dry retching.

LABORATORY DATA: Urinalysis normal. Hemoglobin 16.6 with Crit of 45. White cell count 5,800. Normal electrolytes, BUN and Glucose. Cholesterol 250. Cardiac enzymes remained normal and the M Bands, CPK was normal. VDRL negative. EKG nonspecific abnormality of the STTwave which fluctuated slightly during the admission.

DISPOSITION: He was discharged to rest for a week and halfe to be followed in clinic and treadmill was scheduled. Medications—nil apart from Ampicillin on prn.

DISCHARGE DIAGNOSIS: Chest pain, cause undetermined. Chronic Bronchitis. Status post peptic ulcer disease.

B. ALLAN, M.D.

BA/ad

FROM MERIT SYSTEMS PROTECTION BOARD

THE PERMANENTE MEDICAL GROUP
1330 CUTTING BOULEVARD
RICHMOND, CALIFORNIA 94804 • (415) 234-3131
DONALD P. FISCHER, M.D.
Physician-in-Chief

June 26, 1979

Department of the Navy,
Naval Support Activity,
Mare Island,
Vallejo, CA 94592
Att'n: Administrative Assistant, Code 02.

RE: LINDAHL, Wayne
MR#: H-1598322
File No: A13-505919

Gentlemen:

Mr. Lindahl continues to have recurrent attacks of disabling bronchitis and exhibits extreme irritability to his bronchial tree when subjected to pollutants or various other irritants.

Acute bronchial irritation and inflammation may be caused by mineral and vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and numerous other irritants including exhaust fumes.

It continues to be my opinion that because of the ubiquitous nature of these pollutants in the work atmosphere he is incapable of working. He was placed on the above restrictions starting June 12, 1979 for an indefinite period of time. These restrictions include no overtime and no heavy exertion.

Sincerely,

/s/ Beverley C. Allan

BEVERLEY C. ALLAN, M.D.
Department of Internal Medicine.

BCA:pb

cc: Kenneth Carlson, Esq.
Office of Workers' Compensation Programs.
Central Business Office
File

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

In Reply Refer To
02C:CB:jlf
12752
02C/213

4 Sep 1979

From: Security Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-18-5184

Subj: Advance Notice of Proposed Separation—Disability

Ref: (a) FPM Chapter 752
(b) FPM Supplement 752
(c) FPM Chapter 306
(d) FPM Chapter 339

Encl: (1) Copy of your Position Description Number 78-31-7/43

1. *Nature of Action.* This is to inform you that it is proposed to separate you from employment at this Activity in accordance with reference (a) through (d). This action is being proposed because your physical condition has disabled you to such an extent that you are unable to perform the full range of duties required of your position as a Police Officer.

2. *Effective Date.* Your proposed separation, if found warranted, will not be effected before a notice period of thirty (30) full calendar days has expired. The notice period begins the day following your receipt of this notice.

3. *Reason for Action.* The specific facts and reasons supporting this proposed separation are as follows:

a. The full range of duties required to be performed by you as a Police Officer are contained in enclosure (1).

b. On 25 June 1979 your private physician, Dr. Beverley C. Allan wrote a statement certifying you have recurrent attacks of disabling bronchitis and you exhibit extreme irri-

tability to your bronchial tree when you are subjected to pollutants or various other irritants. She went on to list the irritants which include vegetable dusts of various kinds, paint fumes, glue, solvents, strong acid fumes, tobacco smoke, and exhaust fumes. She added, it continues to be her opinion that because of the ubiquitous nature of these pollutants in the work atmosphere you are incapable of working. Dr. Allan further stated you were to work no overtime and no heavy exertion.

c. Dr. J.P. Williams of the Mare Island Naval Shipyard Industrial Dispensary has evaluated your physical qualifications to effectively perform the full range of duties as a Police Officer. Your capacity to perform these duties was found to be as follows:

ENVIRONMENTAL AND FUNCTIONAL FACTORS

No capacity—Usual overtime work, exhaust fumes, paint fumes, dust, silica, asbestos, fumes, smoke or gases, and solvents (degreasing agents).

Partial capacity—Moderate lifting 15-44 lbs. and moderate carrying 15-44 lbs.

d. Because of your physical condition, it is not possible to assign you to the full range of duties required of a Police Officer at this Activity.

e. Since you occupy a position which provides continuing services around the clock, it is not possible for this Activity to permit the position to remain unfilled.

f. Placement in another position in the Activity has been considered; however, there is no vacant position for which you are technically and physically qualified in which you can be placed.

4. *Reply*. You may reply orally and in writing to this Advance Notice of Proposed Separation—Disability and you may furnish affidavits in support of your reply. In addition, you are entitled to be representated by an attorney or other representative. Your response and any relevant material must be submitted not later than ten (10) calendar days from the date of this advance notice and shall be addressed to the Security Officer, Naval Support Activity, Mare Island, Vallejo, California 94592. Full consideration

will be given to any reply you may make. The referenced material which supports this advance notice may be reviewed in the Personnel Office, Code 02C, Building 851. You will be allowed a maximum period of four (4) hours of official time to review this material.

RAY C. NIEMAN

I HEREBY CERTIFY RECEIPT OF ORIGINAL CORRESPONDENCE ON AUG. 5, 1979

(Date)

WAYNE LINDAHL 479185184

(Name) (Employee Number)

FROM MERIT SYSTEMS PROTECTION BOARD

DEPARTMENT OF THE NAVY
NAVAL SUPPORT ACTIVITY, MARE ISLAND
VALLEJO, CALIFORNIA 94592

In Reply Refer to:
02C:CB:jlf
12752
Ser 02C/227
17 Sep 1979

From: Commanding Officer
To: Wayne (NMN) Lindahl, Police Officer, Employee Number 479-18-5184

Subj: Notice of Decision to Effect Separation—Disability

Ref: (a) FPM 752
(b) FPM 339

Encl: (1) Copy of Advance Notice of Proposed Separation—Disability 02C:CB:jlf 12752 02C/213 of 4 Sep 79
(2) Appeal Rights

1. *Decision.* In accordance with references (a) and (b), you are hereby notified of my decision to effect your separation from employment at this Activity.

2. *Effective Date.* This separation will be effected on 5 October 1979.

3. *Reason for Action.* This separation is being effected for your inability to perform the full range of duties of your rating, Police Officer, because of physical disability.

4. *Restatement of Reason.* The reason upon which this separation action is based is restated in enclosure (1).

5. *Findings in Review of Reason.* Enclosure (1) notified you of your right to reply personally and in writing to the Advance Notice of Proposed Separation—Disability and of your right to furnish affidavits in support of your reply.

A thorough review has been made of the reason for this action as contained in enclosure (1). After careful consideration of all available evidence, I find that the reason for this action is fully supported and sustained, and your separation

is warranted. Since you did not reply, my decision is based on evidence of record.

6. *Clearance.* Your identification badge and all government tools and equipment charged to you must be returned and a clearance slip completed before any final monies due you may be issued.

7. *Appeal Rights.* Your rights to appeal this decision are contained in enclosure (2).

/s/ J. K. Nunneley
J. K. NUNNELEY

APPEAL RIGHTS

You may appeal at any time after receipt of this decision but not later than twenty (20) calendar days after the effective date of the action. Your right of appeal is as follows:

You may appeal to the Merit Systems Protection board (MSPB), San Francisco Field Office, 525 Market Street, San Francisco, California 94105. The appeal shall be in writing and shall set forth your reasons for contesting the adverse action, with such proof and pertinent documents as you are able to submit. You should also indicate whether or not a hearing is desired. The attached form is provided for your convenience however, you are *not* required to utilize the form.

The decision is MSPB is final. However, either party to the appeal may petition MSPB to reopen and reconsider the decision.

If you have questions concerning your appeal rights and the appeal procedure, you should contact Carolyn Biddinger, Code 02C, extension 2122 or 4417.

FROM MERIT SYSTEMS PROTECTION BOARD

APPLICATION FOR RETIREMENT
CIVIL SERVICE RETIREMENT SYSTEM

(USE ONLY IF SEPARATED ON OR AFTER OCTOBER 20, 1969)

To Avoid Delay—1. Read ...ormation Carefully; 2. Complete Application in Full; 3. Typewrite or Print in Ink

A. IDENTIFYING INFORMATION

1. NAME (Last) (First) (Middle)	2. LIST ALL OTHER NAMES YOU HAVE USED
LINDAHL, Wayne (NMN)	None

3. ADDRESS (Including ZIP code)	4. PHONE NUMBER (Including Area Code)	5. DATE OF BIRTH (Month) (Day) (Year)	6. SOCIAL SECURITY ACCOUNT NUMBER
2685 Magee Ave. San Pablo, CA 94806	415 758-9521	7-2-26	479-18-5184

7A. ARE YOU A CITIZEN OF THE UNITED STATES OF AMERICA?	7B. IF "NO", OF WHAT COUNTRY ARE YOU A CITIZEN?
[X] YES [ ] NO	S

8A. ARE YOU MARRIED [X] YES [ ] NO	8B. IF "YES" GIVE THE FOLLOWING INFORMATION			
WIFE'S OR HUSBAND'S NAME (First) (Middle)	HER (OR HIS) BIRTH DATE (Month) (Day) (Year)	HER (OR HIS) SOCIAL SECURITY ACCOUNT NUMBER	DATE OF MARRIAGE (Month) (Day) (Year)	PLACE OF MARRIAGE (City) (State)	MARRIAGE PERFORMED BY [X] CLERGYMAN OR AGENCY OF THE PEACE [ ] OTHER (Specify)
Mary Lou	3 - 3- 28	546-36-1728	12-28-50	Richmond, CA	

9A. DO YOU HAVE ANY UNMARRIED CHILDREN UNDER AGE 22 (Or over age 22 and incapable of self support because of a disability incurred before age 18)? [ ] YES [X]

9B. IF "YES" LIST NAME AND DATE OF BIRTH OF EACH CHILD. WRITE THE WORD "DISABLED" AFTER CHILD'S NAME WHERE APPLICABLE

CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)	CHILD'S NAME (First) (Middle) (Last)	DATE OF BIRTH (Mo.) (Day) (Yr.)

B. CIVILIAN AND MILITARY SERVICE

1. DEPARTMENT OR AGENCY IN WHICH PRESENTLY OR LAST EMPLOYED, INCLUDING BUREAU OR DIVISION, AND ADDRESS, INCLUDING ZIP CODE	2. DATE OF FINAL SEPARATION (Month) (Day) (Year)	3. APPROXIMATE YEARS OF FEDERAL SERVICE CIVILIAN	MILITARY
Naval Support Activity 94592 05 Mare Island Naval Shipyard, Vallejo, CA	Oct - 5- 1979	12 YRS	7 YRS 6 MOS

4. TITLE OF LAST POSITION: Police Officer, GS-5

5. DO YOU HAVE FEDERAL EMPLOYEES GROUP LIFE INSURANCE?	6. IF YOU HAVE REGULAR LIFE INSURANCE, DO YOU ALSO HAVE OPTIONAL LIFE INSURANCE?	7A. HAVE YOU BEEN ENROLLED IN A PLAN UNDER THE FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM SINCE YOUR FIRST OPPORTUNITY TO ENROLL OR FOR AT LEAST FIVE YEARS IMMEDIATELY BEFORE YOUR RETIREMENT?	7B. IF "YES" PLEASE LIST YOUR CURRENT: CARRIER CONTROL NUMBER	ENROLLMENT CODE NUMBER
[X] YES [ ] NO	[ ] YES [X] NO	[X] YES [ ] NO	K+I SERVICE-Admin V598322	592 SMI-SNGL

8. COMPLETE THE SCHEDULE BELOW IF YOU HAVE PERFORMED ACTIVE DUTY THAT TERMINATED UNDER HONORABLE CONDITIONS IN ANY OF THE FOLLOWING SERVICES (A) ARMY, NAVY, MARINE CORPS, AIR FORCE, OR COAST GUARD OF THE UNITED STATES; OR (B) REGULAR CORPS OR RESERVE CORPS OF THE PUBLIC HEALTH SERVICE AFTER JUNE 30, 1960; OR (C) AS A COMMISSIONED OFFICER OF THE COAST AND GEODETIC SURVEY AFTER JUNE 30, 1961; OR (D) AS A COMMISSIONED OFFICER OF THE ENVIRONMENTAL SCIENCE SERVICES ADMINISTRATION. ATTACH A COPY OF YOUR DISCHARGE CERTIFICATE OR OTHER CERTIFICATE OF ACTIVE MILITARY SERVICE, IF AVAILABLE

BRANCH OF SERVICE	SERIAL NUMBER	DATE OF ENTRANCE ON ACTIVE DUTY	DATE OF SEPARATION FROM ACTIVE DUTY	LAST GRADE OR RANK	ORGANIZATION AT DISCHARGE (Div., Regt., Co., etc.)
U. S. Navy	957 86 36	NOV 14-1944	6 APR 46	SEAMAN 1st Class	USNTS MM 334 Nav. Ad. Unit 87
" " "	" " "	Oct 26 1947	26 Oct 1950	" "	" " "
" " "	" " "	27 Oct 50	16 Dec 1953	Metalsmith 2nd	Alleged Sea

9A. ARE YOU A MILITARY RESERVIST (Either Active or Inactive)?	9B. ARE YOU IN RECEIPT OF OR HAVE YOU EVER APPLIED FOR MILITARY RETIRED PAY? (Retired pay does not include V.A. pension or compensation.)	9C. IF "YES" WERE YOU RETIRED FROM A RESERVE COMPONENT UNDER CHAPTER 67, TITLE 10, USC? (Formerly Title III Public Law 90-810)
[ ] YES [X] NO	[ ] YES [X] NO	[ ] YES [ ] NO

C. DISABILITY INFORMATION (Only Applicants for Total Disability Retirement Will Complete This Part)

1. BRIEFLY DESCRIBE YOUR DISABILITIES, STATE WHEN OCCURRED, AND HOW THEY INTERFERE WITH PERFORMANCE OF THE DUTIES OF YOUR POSITION (ATTACH ADDITIONAL COMMENTS ON PLAIN SHEET OF PAPER, IF NECESSARY.) ALSO, STATE MONTH AND YEAR IN WHICH YOU BECAME TOTALLY DISABLED. Accumulative PULMANARY-CHRONIC BRONCHITIS - SEVERE Co-SH and LEG FATIGUE - TOTAL EXHAUSTION SWEATING - SENSITIVE TO HOT-COLD TEMPCHANGES PHYSICAL EXHAUSTION - TIRE VERY EASILY. LUNG PAINS HEART ATTACK - CHRON. CONGESTIVE OFF WORK-FREQUENT DOCTORS VISITS

D. OTHER CLAIM INFORMATION MEDICARE ALL THIS Time

1A. HAVE YOU EVER RECEIVED OR MADE APPLICATION FOR COMPENSATION UNDER THE FEDERAL EMPLOYEES' COMPENSATION ACT?	1B. IF "YES" STATE THE NUMBER OF YOUR COMPENSATION CLAIM AND THE PERIOD FOR WHICH YOU RECEIVED COMPENSATION: CLAIM NUMBER	FROM (Mo.) (Day) (Year) TO (Mo.) (Day) (Year)
[X] YES [ ] NO	A13-505919	UNDER ADJUDICATION 25 June 1979

2A. HAVE YOU PREVIOUSLY FILED ANY APPLICATION UNDER THE CIVIL SERVICE RETIREMENT SYSTEM, INCLUDING APPLICATION FOR RETIREMENT, REFUND, DEPOSIT OR REDEPOSIT, OR VOLUNTARY CONTRIBUTIONS?	2B. IF "YES" INDICATE THE TYPE(S) OF APPLICATION AND GIVE THE CLAIM NUMBER(S) IF KNOWN	CLAIM NUMBER(S)
[X] YES [ ] NO	[X] RETIREMENT [ ] DEPOSIT OR REDEPOSIT [ ] REFUND [ ] VOLUNTARY CONTRIBUTIONS	054 811 576

3A. DO YOU HAVE LIFE INSURANCE THROUGH A FORMER EMPLOYEE BENEFICIAL ASSOCIATION FOR WHICH YOU NOW PAY PREMIUMS TO THE CIVIL SERVICE COMMISSION?	3B. IF "YES" GIVE YOUR ACCOUNT NUMBER
[ ] YES [X] NO	

4A. HAVE YOU EVER BEEN EMPLOYED UNDER ANOTHER RETIREMENT SYSTEM FOR FEDERAL OR DISTRICT OF COLUMBIA EMPLOYEES?	4B. IF "YES" GIVE THE NAME OF THE OTHER RETIREMENT SYSTEM
[ ] YES [X] NO	

INDICATE, BY SIGNING YOUR INITIALS IN THE APPROPRIATE BOX BELOW, THE TYPE OF ANNUITY YOU WANT TO RECEIVE. READ THE EXPLANATIONS AND CONSIDER THE MATTER CAREFULLY. NO CHANGE WILL BE PERMITTED AFTER AN ANNUITY HAS BEEN GRANTED. IF YOU WANT AN ANNUITY WITH A SURVIVOR BENEFIT, BE SURE TO GIVE THE OTHER INFORMATION CALLED FOR.

F. TYPES OF ANNUITY: MARRIED APPLICANTS ONLY

1. ANNUITY WITH SURVIVOR BENEFIT TO WIDOW OR WIDOWER

INITIALS: W.F.

- If you are married, you will receive this type of annuity unless you choose the annuity in F. 2.

SPECIFY THE PORTION OF YOUR ANNUITY YOU WANT USED AS THE BASE FOR YOUR WIDOW'S (OR WIDOWER'S) SURVIVOR ANNUITY.

If you want all your annuity used as the base for the survivor benefit, write the word "all" in the box below. If you want only part of your annuity used as the base for the survivor benefit, write the yearly amount of your annuity you want used.

$ all

THE SURVIVOR'S ANNUITY WILL BE 55% OF ALL OR WHATEVER PORTION OF YOUR ANNUITY YOU SPECIFY AS THE BASE FOR HER (OR HIS) BENEFIT.

- The annuity payable to you during your lifetime will be reduced by 2½% of any amount up to $3,600 a year used as the base for the survivor benefit, plus 10% of any amount over $3,600 so used.
- If your wife (or husband) should die before you, no change in type of annuity will be permitted, your annuity will not be increased, nor may you name any other person as survivor.
- The survivor's annuity will not begin until your death.

2. ANNUITY WITHOUT SURVIVOR BENEFIT

INITIALS:

(I do not desire my wife (or husband) to receive a survivor annuity benefit after my death.)

- If you choose this type, your wife (or husband) cannot be paid a survivor annuity after your death.
- This type provides annuity payments to you only.

G. TYPES OF ANNUITY: UNMARRIED APPLICANTS ONLY (Including Widowed and Divorced)

1. ANNUITY WITHOUT SURVIVOR BENEFIT

INITIALS:

47

- If you are not married, you will receive this type of annuity unless you choose the annuity in G. 2.
- This type provides annuity payments to you only.

2. ANNUITY WITH SURVIVOR BENEFIT TO NAMED PERSON HAVING AN INSURABLE INTEREST

INITIALS:

SPECIFY THE NAME, RELATIONSHIP, DATE OF BIRTH, AND SOCIAL SECURITY ACCOUNT NUMBER OF THE PERSON YOU WISH TO RECEIVE THE SURVIVOR ANNUITY

NAME OF PERSON (First, middle, last)

RELATIONSHIP	DATE OF BIRTH (Mo., day, yr.)
	SOCIAL SECURITY ACCOUNT NUMBER

SEE UNMARRIED EMPLOYEES UNDER INFORMATION REGARDING SURVIVOR ANNUITIES ON THE ATTACHED INFORMATION SHEET FOR EXPLANATION OF REDUCTION IN YOUR ANNUITY.

- This type is available to all retiring *unmarried* employees who are *in good health*.
- It provides a reduced annuity to you and a survivor annuity to the person named as having an insurable interest.
- The survivor's annuity will not begin until your death.
- The survivor's annuity will be 55% of the reduced annuity you receive.
- If you choose this type of annuity you will have to undergo a medical examination which will be arranged by the Civil Service Commission at no cost to you.
- If the person named as having an insurable interest should die before you, no change in type of annuity will be permitted, your annuity will not be increased, nor may you name any other person as survivor.

H. CERTIFICATION OF APPLICANT

WARNING.—Any intentional false statement in this application or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years, or both (18 U.S.C. 1001).

I hereby certify that all statements made in this application are true to the best of my knowledge and belief.

Oct. 9-1979 (DATE) wayne Kinkaid (SIGNATURE OF APPLICANT)

I. FOR USE OF EMPLOYING AGENCY (See FPM Supplement 831-1 for instructions.)

CHECK APPROPRIATE BOX:

☐ INDIVIDUAL RETIREMENT RECORD, SF 2806, AND REGISTER OF SEPARATIONS AND TRANSFERS, SF 2807, ARE ATTACHED.

☐ INDIVIDUAL RETIREMENT RECORD, SF 2806, WAS SENT TO U.S. CIVIL SERVICE COMMISSION ON _____ (DATE) WITH REGISTER OF SEPARATIONS AND TRANSFERS, SF 2807, NO. _____.

NAME OF AGENCY PERSON WHO CAN FURNISH ADDITIONAL INFORMATION ABOUT THIS APPLICATION, IF NECESSARY (Type or print)	SIGNATURE OF RESPONSIBLE AGENCY OFFICIAL	
	OFFICIAL TITLE	DATE
TELEPHONE NUMBER, INCLUDING AREA CODE	DEPARTMENT OR AGENCY	

OFFENSES BARRING ANNUITY PAYMENTS: Title 5 USC 8312 prohibits payment of annuity to persons who have committed specified offenses involving the national security of the United States. Employing agencies are responsible for submitting all pertinent information to the Civil Service Commission's Bureau of Retirement, Insurance, and Occupational Health in any case when this law possibly applies.

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES OF AMERICA
OFFICE OF PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

APRIL 8, 1980

Wayne Lindahl
2685 Magee Avenue
San Pablo, CA 94806

Claim Number: CSA 2 115 707
Position: Police Officer

Your application for retirement under the disability provisions of the Civil Service Retirement Law has not been approved because total disability for useful and efficient service in the above position is not shown.

A careful review and evaluation by the Office of Personnel Management's medical staff of all evidence submitted in your case fails to establish that you have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position from which you are seeking retirement. Since the retirement law does not authorize benefits based on partial disability, your application cannot be approved at this time.

If you believe that the action taken on your application is not proper, you may request reconsideration of our finding within 30 calendar days after the date you receive this letter. Any request you make should show your name and address (including ZIP code), the claim number shown above and the reason for the request for reconsideration. You may submit with your request any additional evidence which you think might support your request. Address your request for reconsideration to the address indicated below.

By reason of your separation you are entitled to annuity beginning when you reach age 62. You may choose to receive an immediate refund of all of your retirement deductions instead of annuity benefits at age 62. If you desire the refund you should complete an Application for Refund of Retirement Deductions, Standard Form 2802, at least 31 days before your 62nd birthday.

Sincerely yours,

Retirement Claims
Retirement Operations Branch

Office of Personnel Management
Chief, Medical Operations Branch
Washington, D.C. 20415

Enclosure

FROM MERIT SYSTEMS PROTECTION BOARD

THE PERMANENTE MEDICAL GROUP
901 NEVIN AVENUE
RICHMOND, CALIFORNIA 94801 • (415)234-3131

DONALD P. FISCHER, M.D.
Physician-in-Chief

MAY 15, 1980

United States of America
Office of Personnel Management,
Chief, Medical Operations Branch,
Washington, D.C. 20415

Re: LINDAHL, Wayne
MR#: H-1598322
POSITION: Police Officer
SS#: 479 18 5184
CLAIM NUMBER: CSA 2 115 707

Dear Sir:

Your letter of April 8, 1980 informing Mr. Lindahl that his application for retirement under the disability provisions of the Civil Service Retirement Law had been disapproved was reviewed by the undersigned.

I will take this time to request a further evaluation of his claim, based on evidence that he does have a disability severe enough to prevent useful, efficient, and safe performance of the essential duties of the position of Police Officer at Mare Island Naval Shipyard.

Mr. Lindahl has been undergoing treatment for some time for a chronic and so far unremitting productive bronchitis. There is ample evidence to conclude that the many and ever-present pollutants, irritants and potential carcinogens in Mr. Lindahl's working life have played a part in causing his pulmonary disease. I consider that his disease causes symptoms of sufficient severity and persistence as to constitute a considerable deviation from what could reasonably be regarded as good health.

I have seen this patient on innumerable occasions with his acute bronchitis, and there is no doubt whatsoever in my mind that each of these attacks, (and many for which he

has not seen me) are in fact attacks of severe bronchitis. He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes. Some of the pains he complains of are, I am sure, due to attacks of acute tracheo bronchitis. He also has some psychological component in his suffering.

It is my opinion that he cannot safely and effectively work in any area that subjects him to pollutants or other irritants. It continues to be my opinion that because of the ubiquitous nature of these pollutants in the work atmosphere, he is incapable of working at Mare Island Naval Shipyard.

If I can be of any further help in processing Mr. Lindahl's claim for retirement, please do not hesitate to contact me.

Sincerely,

/s/ Beverly C. Allan
BEVERLY C. ALLAN, M.D.,
Department of Internal Medicine.

BCA:pb
cc: Wayne Lindahl
File

FROM MERIT SYSTEMS PROTECTION BOARD
UNITED STATES OFFICE OF
PERSONNEL MANAGEMENT
WASHINGTON, D.C. 20415

CSA 2 115 707

Wayne Lindahl
2685 Magee Avenue
San Pablo, California 94806

Reconsideration request of Wayne Lindhal
5USC 8331(6).8337

Federal Personnel Manual Supplement 831-1, Subchapter S10 sets out the conditions that must be met by an employee in order to be eligible for an immediate annuity because of disability retirement. One of these conditions is that an employee must, while employed subject to the retirement system, have become totally disabled for useful and efficient service in his or her position. To make this determination, the claim is reviewed with attention to the following considerations:

1. Documentation of a deficiency in service with respect to performance, conduct or attendance.
2. Documentation of a medical condition—disease or injury.
3. A relationship between the service deficiency and the medical condition such that the medical condition has caused the service deficiency.
4. The expected duration of the medical condition.
5. The incompatibility of the medical condition with either useful service in or retention in the position.

A determination of total disability is made when the information in the file indicates that there is a service deficiency of sufficient degree, caused by disease or injury which would preclude useful and efficient service by the employee.

The records show that your disability retirement application was signed on October 9, 1979. The objective medical evidence submitted in your case failed to establish that you were totally disabled within the meaning and intent of the civil service retirement regulations and thereupon the claim

was disallowed. On March 21, 1980, you were sent notification that your claim was denied. You requested reconsideration of this action by letter dated May 15, 1980, which was accepted to initiate a review of your claim.

The requirements of the last position occupied, that of Police Officer was noted. We have evaluated all of the information that was presented. The data includes:

1. Letter—Beverly C. Allan, M.D.—May 15, 1980
2. Report—Superior Officer—May 18, 1980
3. Letter—Ray C. Nieman—May 27, 1980

In your application, we gave reasons for requesting a disability retirement annuity as follows:

1. Acute pulmonary problems
2. chronic Bronchitis
3. severe cough
4. chills
5. fever
6. total exhaustion
7. tire very easily
8. lung pains
9. heart attack
10. cannot recuperate strength
11. off work frequently
12. sweating
13. sensitive to hot and cold temperature changes
14. physical exhaustion

Your supervisor cites that according to the physician, you were not allowed to climb stairs, walk excessively, stand for extended time, come in contact with fumes or cigarette smoke.

You have many subjective symptoms but very few objective findings to uphold the symptomatology. Part of your disability at this time is due to poor conditioning since you are overweight and indulge in very little physical activity according to Dr. Frederick Epstein. Pulmonary function tests are normal.

While your condition is admittedly bothersome, there are no clinical findings which document a physical impairment

incompatible with retention in your position or the fulfillment of your assigned duties.

We recognize that there may be discomforts and annoyances present; however, we lack objective medical findings to support a sustained condition of total disablement for your position held. There are no provisions in the disability retirement regulations for annuity payments for partial disability.

An analysis of all the facts and the total medical evidence in the file leads us to a conclusion that additional medical examinations are not indicated and allowance of your claim is not warranted.

Should you wish to initiate an appeal of this decision, mail it directly to:

Regional Administrator, Merit System
Protection Board
525 Market Street
24th Floor
San Francisco, California 94105

Along with the letter of appeal you should submit any further medical or other evidence to substantiate your claim.

We regret that the facts of the case do not allow us to give you a more favorable determination.

Sincerely yours,

GEORGE M. SMITH, M.D.
Medical Director

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO FIELD OFFICE

WAYNE LINDAHL

v.

OFFICE OF PERSONNEL MANAGEMENT

Decision Number: SF831L8110492
Date: May 8, 1981

INTRODUCTION

By petition filed January 9, 1981, appellant Wayne Lindahl appealed a December 9, 1980, reconsideration decision from the Office of Personnel Management (OPM) which disallowed his application for disability retirement dated October 9, 1979. Appeal File, AF, Tabs 1, 4, and 11.

JURISDICTION

Since the appellant's application for disability retirement was initiated after January 11, 1979, the effective date of the Civil Service Reform Act of 1978, this appeal is covered by that Act. Pub. L. No. 95-454, 92 Stat. 1111 (1978), (Codified in scattered sections of 5 U.S.C.).

A right of appeal from a reconsideration decision by OPM is granted by 5 U.S.C. 8347(d), which states,"An administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board." This right of appeal is confirmed by OPM's own regulations, which state that an appeal to this Board may be made after receipt of the reconsideration decision. 5 C.F.R. 831.1205 (45 Fed. Reg. 23633, April 8, 1980).

Accordingly, this appeal is within the jurisdiction of this Board.

ANALYSIS AND FINDINGS

The evidence upon which this decision is based was obtained from written submissions of both parties and testi-

mony presented at a hearing held in San Francisco, California. OPM was advised of the date, time, and location by notice dated February 27, 1981. AF, Tab 28.

The basic statutory entitlement to a disability retirement is set forth in 5 U.S.C. 8337(a) as follows: "An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency."

The term "disabled" is defined as "totally disabled . . . for useful and efficient service in the grade or class of position last occupied by the employee or Member because of disease or injury not due to vicious habits, intemperance, or willful misconduct on his part within 5 years before becoming so disabled." 5 U.S.C. 8331(6).

At the time of his application, appellant had completed in excess of five (5) years of Federal civilian service covered by the Civil Service Retirement System.

OPM has made no finding or allegation that "vicious habits, intemperance or willful misconduct" played any role in appellant's condition, and this grounds for exclusion under 5 U.S.C. 8331(6) is given no consideration.

The sole substantive issue, therefore, is whether appellant was disabled within the meaning of 5 U.S.C. 8331(6).

Before addressing that issue, however, it is necessary to consider the matter of the degree of proof and which party has the burden of proof to establish the disability.

The cited Civil Service Reform Act (Reform Act) and the Board's regulations provide that in appeals before the Board, the agency has the burden of proving that its decisions are supported by a preponderance of the evidence, 5 U.S.C. 7701(c)(1)(B) (1980), and 5 C.F.R. 1201.56(a)(iii)(1980), except in cases brought under 5 U.S.C. 4303, which covers actions based on unacceptable performance. 5 U.S.C. 7701(c)(1)(1980).

If these provisions were applied to an appeal such as the instant one, OPM would be required to establish, by a preponderance of the evidence, that appellant was *not* entitled to the disability retirement claimed.

However, the legislative history indicates that in enacting the burden of proof provision, Congress was concerned only with the Board's review of adverse actions concerning misconduct or unacceptable performance. There was no reference to disability retirement appeals. H.R. Rep. No. 95-1717, 95th Cong. 2nd Sess., 138-139 (1978), *reprinted in* Committee on Post Office and Civil Service, H.R. 96th Cong. 1st Ses., Vol. II, LEGISLATIVE HISTORY OF THE CIVIL SERVICE REFORM ACT OF 1978, at 1980-1981 (1979).

Furthermore, there is no indication that the cited Board regulation on burden of proof was intended to do anything more than implement the provision of the statute.

The general rule of law requires the party asserting the existence of disputed facts to carry the burden of proof regarding those facts. That is, he or she must persuade the trier of fact that they are true. *Williams* v. *Administrator of National Aeronautics and Space Administration*, 463 F.2d 1391, 1400 (C.C.P.A. 1972); *Marcum* v. *U.S.*, 452 F.2d 36, 39 (5th Cir.1971). In this appeal, the appellant has made a claim of disability, OPM has adjudicated that claim, and the appellant has appealed to this Board. If the burden of proof were placed on OPM, the mere presentation of a claim, without supporting evidence, would require OPM to undertake the burden of disproving the claim. Aside from being contrary to the general rule of law, cited above, this result would run counter to the well settled principle that the party with the best knowledge of the facts, absent other considerations, should bear the burden of proof as to those facts. *Bratton Corp.* v. *OSHRC*, 590 F.2d 273 (8th Cir. 1979); *Old Ben Coal Corp.* v. *Interior Bd. of Mine Op. App.*, 523 F.2d 25, 36, (7th Cir. 1975); cf., *Del Vecchio* v. *Bowers*, 296 U.S. 280, 286 (1935).

In voluntary disability retirement cases, the appellant is significantly more likely than OPM to be aware of his or her health and its effect on job performance. Moreover, in similar cases where applicants seek disability benefits under the Social Security Act, the court has held, "the appellant has the burden of establishing entitlement to disability benefits under the Social Security Act." *Billings* v. *United*

States, 334 F. Supp. 1392 (D. Nebraska 1971). Also, in *Turner* v. *Califano*, 563 F.2d 669, 670 (5th Cir.1977), the court held, "the burden of proof in Social Security cases rests upon the claimant." Similarly, the burden of proof rests with the applicant for unemployment compensation, *Department of Industrial Relations* v. *Tomlinson*, 36 So.2d 496 (Ala. App. 1948); for black lung benefits under the Federal Coal Mine Health & Safety Act, *Brock* v. *Weinberger*, 405 F. Supp. 1329 (D. Ct. Ark. 1975); and for worker's compensation benefits under the Longshoremen's Compensation Act, *Eschach* v. *Contractors, Pacific Naval Air Base*, 181 F.2d 860 (7th Cir. 1950).

Therefore, I conclude that the burden is on the appellant in this case to prove that he is entitled to the disability retirement payments which he seeks.

With reference to the standard or degree of proof which the appellant must meet, 5 U.S.C. 7701(c)(1)(B), as noted earlier, requires a preponderance of the evidence standard. The preponderance standard requires a showing of evidence "that a reasonable person would accept as sufficient to find a contested fact more probably true than untrue...." *William Parker* v. *Defense Logistics Agency*, MSPB Order Docket No. PH053199001 p. 29 (Feb. 19, 1980). In addition, the preponderance standard is the usual evidentiary standard in administrative proceedings. B. Menzines, J. Stein, J. Gruff, *Administrative Law*, 24-29 (1980).

In summary, appellant must prove his disability by a preponderance.

In its reconsideration decision of Devember 4, 1980, OPM briefly addressed appellant's application, the stated reasons given for the application, appellant's position description as a Police Officer with the Naval Support Activity, Mare Island, Vallejo, California, and the medical evidence. OPM's Medical Director, Dr. George M. Smith, M.D., concluded that appellant had "many subjective symptoms, but very few objective findings to uphold the symptomatology." Dr. Smith noted that appellant's "pulmonary function tests were normal" in concluding that total disability, as required, had not been shown. AF, Tab 4.

Regarding the type of evidence which may be considered in determining disability, I will address the following four categories: (1) the appellant's subjective complaints and evidence of related objective manifestations; (2) appellant's work history, including supervisory observations; (3) objective medical evidence; and (4) expert medical opinions. The weight to be given each of these categories is dependent upon the usual considerations inherent in the weighing of evidence in any individual case (e.g., reliability, relevance). There is no requirement in the relevant statutes, regulations, or rules that *only* a single type of evidence of a certain character, for example, "objective medical evidence" must be considered.

Concerning evidence of the type in category (1), above, appellant's application disclosed the following description of his disabilities:

> Accumulative, acute pulmanary (sic), chronic bronchitis—severe cough, chills, fever, total exhaustion, sweating, sensitive to hot-cold temperature changes physical exhaustion—tire very early—lung pains heart attack—cannot recooperate (sic) strength. Off work—Frequent Doctor's visits and medicine all the time congestion" (Original punctuation).

The stated date of total disability given by appellant was October 26, 1976. AF, Tab 11.

Appellant did not augment these contentions by testimony. The record, however, contains a previous application for disability retirement, dated April 3, 1978, in which appellant cited the following disabilities: "Shortness of breath, pains in my chest, coughing, sneezing, frequent fever and chills. Infection in my lungs. Bronchitis, hypertention." AF, Tab 24.

Regarding work history, category (2), above, no direct evidence of the total amount of lost time due to illness was provided. The substance of their testimony was that appellant's personal physician Beverly Allen, M.D., had provided reports that concluded that appellant should not be assigned overtime, and he was also precluded from performing the full range of his duties due to his bronchial condition which was exacerbated by exhaust fumes, dust from

sand blasting and smoke from cigarettes. Hearing Transcript, HT, pp. 39-43, 52-55.

One of appellant's supervisor's, R.C. Nieman, Security Officer, testified that appellant had a "very poor attendance record" and had frequent sick leave. HT, p. 70. Another, L.I. Hodges, Chief of Police, noted that appellant frequently complained about irritants. However, Mr. Hodges pointed out that he never observed symptoms of irritation, but only heard appellant's complaints, for example, about smoke in the "squad room". HT, pp 57-58. The record did contain the note in the Superior Officer's Statement portion of the application that "when around persons smoking, (appellant) appeared to start coughing." AF, Tab 8.

Taken as a whole, however, the record discloses a definite lack of evidence of observed symptoms of irritation such as coughing, sneezing, breathing difficulties, watering eyes, etc. or other observable manifestations of appellant's claimed ailments by co-workers and supervisors. I consider this lack of evidence to be of some weight when viewed in the light of medical reports described, below, since these persons were regularly with appellant during duty hours, and no reason has been established or even advanced to discount the statement of Mr. Hodges or to explain this want of objective corroboration.

Before turning to the categories (3) and (4), above, objective medical findings and medical opinion, I note that appellant has referred to his separation from his position by the Naval Support Activity, on October 5, 1980. The record reveals that his separation was proposed and effected for the reason that his "physical condition (had) disabled (him) to such an extent that (he was) unable to perform the full range of duties required....". AF, Tabs 7 and 9; Hearing Exhibit, HE, 1. Appellant's supervisors testified that this decision to separate appellant was based on reports of Dr. Allen which concluded that he could only perform limited not the full range of his duties because of his stated bronchial condition.

It should be noted, therefore, that appellant's supervisors did not conclude appellant could not do his duties because of their own personal observations. Rather their con-

clusions were based on physicians reports. HT pp. 40, 55-56, 69-70. A Superior Officer's Statement, a part of the disability application noted, "*According to his physician*, he was not allowed to climb stairs walk excessively, stand for an extended period of time, come in contact with fumes or cigarette smoke". AF, Tab 8. (Emphasis added).

The Board has repeatedly made clear that a conclusion by the agency that an employee is not fit to continue satisfactory duty performance is not dispositive of the issue of whether he is totally disabled under 5 U.S.C. 8331(6) so as to be eligible for a disability annuity under 5 U.S.C. 8337 from OPM. *Page* v. *OPM*, MSPB Order No. SF831L09015 (12/8/80); *Cullerton* v. *OPM*, MSPB Order No. CH831L8010088 (3/17/81); *Boyd* v. *OPM*, MSPB Order No. SL831L8010056 (3/17/81); *Basinger* v. *OPM*, MSPB Docket No. DC831L09014 (3/17/81), citing *Polos* v. *United States*, 621 F.2d 385, 393 (Ct. Cl. 1980), and *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969).

The record contains several medical opinions and reports of medical findings. Those completely supportive of appellant's claim were provided by his physician Dr. Allen. Dr. Allen's most recent report of record was dated May 15, 1980. Dr. Allen stated that she had been appellant on "innumerable occasions with his acute bronchitis" and there was "no doubt whatsoever in (her) mind that each of these attacks ... are (sic) in fact attacks of severe bronchitis". She concluded, "He has frequent uncontrollable coughs, in my opinion undoubtedly caused by pollutants in the air which he breathes.... He also has some psychological component in his suffering." She concluded that he was not capable of working at his position due to his condition, and the "ubiquitous nature" of pollutants in the work atmosphere. AF, Tab 6.

Dr. Allen's statement of September 25, 1979, submitted with the application at issue, provided a diagnosis of "chronic bronchitis," and concluded that appellant was permanently disabled. Under physical findings, Dr. Allen noted that appellant's "treadmill and cardiac x-rays were normal". AF, Tab 22.

Enclosed with her report were copies of records of appellant's hospitalization in January 1979. The Discharge Summary prepared by Dr. Allen showed "Physical Examination: Patient ... has little to find". "Laboratory Data" identified no positive test or laboratory findings relative to bronchitis. AF, Tab 20. In a letter to the employing agency, dated June 20, 1979, Dr. Allen noted appellant had recurrent attacks of disabling bronchitis and her opinion that he was incapable of working. AF, Tab 21.

I have also considered Dr. Allen's earlier submitted reports including those transmitted with a previous application for disability retirement to OPM submitted on April 3, 1978. AF, Tab 24. This was denied by OPM on October 17, 1978. AF, Tab 23. This application was based on the claimed bronchitis.

Dr. Allen's report of physical findings noted recurrent episodes of bronchitis. Chest x-ray was "unremarkable except for slight tortuosity of the aorta." Pulmonary function studies were noted without conclusion as to abnormality or evidence of disability. AF, Tab 17. She concluded that appellant was disabled. Appellant's respiration rate was described as "normal".

A report dated February 13, 1978, by John Williams, M.D., of the employing agency's Medical Department stated physical findings and noted appellant "coughing (hacking) throughout the examination," Other findings were negative. Regarding "CHEST: Ausculation of the heart shows a regular rhythm with no murmurs. (word omitted—Lungs?) are clear." Dr. Williams' concluded, "Employee is probably disabled for his position and for any work requiring exposure to significant levels of stress or to respiratory irritants." AF, Tab 26.

Other letters of Dr. Allen dated August 17, 1978, and October 25, and September 9, 1977, are a matter of record. These refer to the condition of bronchitis, said to result from pollutants at the work location, and do not describe tests or other laboratory indicia of the condition. AF, Tabs 19, 16, and 15.

OPM referred appellant to a physician, Frederick Epstein, M.D., who twice examined appellant in February

1980, and provided a report detailing the results of tests performed, as well as providing an opinion. AF, Tab 13.

Regarding environmentally induced bronchitis, Dr. Epstein noted the following:

> He has been told by his Kaiser physician that he has an environmentally induced chronic bronchitis. However, since he has been off work, his symptoms have been no better. He states that he coughs and sneezes a lot. He has been referred for allergy testing at Kaiser, and these studies were essentially negative except for a mild reaction to corn. He continues to feel fatigue all the time. He has recently been on antibiotics fairly continuously, alternating Ampicillin and Tetracycline. He has sustained no weight loss.

Regarding chest and lungs, Dr. Epstein noted:

> Examination of the chest reveals it to be well muscled. Expansion is equal bilaterally, and the diaphragms seem to move well. His lungs are clear to percussion and auscultation. There is no wheezing heard even on forced expiration.
>
> Chest x-rays were done in inspiration and expiration in the PA view and in the lateral projection. These studies showed the lung parenchyma to be essentially clear. The diaphragms moved well. The heart was not enlarged. However, there was some pleural thickening along the lateral chest walls, bilaterally, which I believe is consistent with but not diagnostic of early asbestosis.
>
> DISCUSSION: From the historical point of view, this patient has had repeated and prolonged respiratory symptoms, since at least 1974. This would appear to be related to a variety of environmental irritants to which he has been exposed, including asbestos.
>
> From an objective standpoint, as the result of my examination and review of his films and pulmonary function tests, it would seem to me that *his subjective symtoms are somewhat out of proportion to the objective findings*, especially in a patient who has never smoked. His ventilation studies reveal a total vital capacity of 5100, which is normal. His FEV_1 is 4200 and the ration of FEV_1 to FVC is 87%, also well within normal limits. We can therefore, I believe, say that *there is no evidence of either restrictive or obstructive*

disease at this time, which would seem to indicate to me that he has little if any interstitial disease from asbestos exposure.

In would seem to me that the most likely classification for his disability would be a *chronic type of sensitivity bronchitis superimposed on a basically anxious personality type*. So far as I can determine, he has never been tried on corticosteroid therapy. As noted, I believe the possibility of minimal pleural asbestosis is very real.

Part of his disability at this time, I believe, is due to poor conditioning, since he is overweight and indulges in very little physical activity. (Emphasis added.)

I have also considered the medical findings of Gerald Levine, M.D., as stated in his report of April 10, 1978. I have considered his findings since they are pertinent to the claimed disabilities, are not significantly removed in time, and they provide objective data on matters addressed by Dr. Allen in her noted reports of 1977 and 1978. AF, Tab 27.

Regarding the relevant condition Dr. Levine noted the following:

PHYSICAL EXAMINATION: He was a dour, large white male with a frequent dry cough during the course of the interview. His blood pressure was 120/90 in the left arm sitting. His heart rate was 72 and regular. Respirations were 12 and unlabored. *Head and Neck*: The fundi were normal. The pupils were equal and reacted to light. There was no jaundice, pallor, cyanosis, cervical adenopathy, or thyromegaly. His throat was erythematous. The jugular venous pressure was not elevated. He was not using his accessory muscles of respiration. *Chest:* The lateral expansion was four inches. Percussion was resonant. The breath sounds were vesicular. There were no adventitious sounds. *Cardiac:* There was no cardiomegaly, murmurs, or gallops. *Abdomen*: There was no hepatosplenomegaly. *Extremities:* There was no clubbing, edema, or calf tenderness. The pedal pulses were present but diminished. *Nuerological*: Physiologically intact.

LABORATORY DATA: The laboratory data included a normal CBC with a hemoglobin of 17.7 gms.% and a hemoglobin of 49.8% with normal red blood cell indices. The white count was 6,000 with a normal differential. A urinalysis was normal. Serum electrolytes, glucose, and BUN were normal as was the remainder of the SMA 12 although the triglycerides nonfasting were minimally elevated to 156. A chest x-ray was interpreted as follows: "Parenchyma is clear. There is minimal diffuse bilateral pleural thickening. Heart is not enlarged. There is a tortuous ascending aorta reflecting perhaps hypertension. There is some elevation of the left diaphragm. No acute disease is identified." An electrocardiogram was within normal limits.

A pulmonary function study included normal static lung volumes with a vital capacity of 4.75 litres which (was) 95% of normal, a residual volume of 102%, a total lung capacity of 97%, and a functional residual capacity of 85%. The mechanics of breathing revealed mild airways obstruction with no significant post-bronchodilator response. The forced vital capacity rose from 5.24 litres before to 5.33 litres after bronchodilator. The forced expiratory volume in one second from 3.14 litres before to 3.01 litres after bronchodilator, and the forced expiratory volume in one second percent, the normal value being greater than 70%, was 60% before and 56% after bronchodilator. The maximal expiratory flow rate was 247 litres per minute before and 239 litres per minute after bronchodilator, the normal range being 432 ± 108 litres per minute. The maximal mid-expiratory flow rate was 2.64 litres per second before and 2.49 litres per second after bronchodilator, the normal range being 3.6 ± 1.1 litres per second. These reveal mild airways obstruction. The helium mixing time was normal excluding maldistribution of inspired air. The diffusion capacity was normal excluding emphysema or interstitial lung disease.

. . .

In my evaluation I had the distinct impression that this man was profoundly depressed. *The physical examination for all intents and purposes was within normal limits.* The *laboratory testing confirmed this evidencing only some mild airways obstruction which*

could not conceivably account for the degree of symptoms the patient has described. I do not doubt that he may have recurrent upper respiratory infections, but there does not seem to be any significant underlying immunologic disorder to account for this. *I do not feel he has any disability relating to his physical conditioning. He certainly does not have any pulmonary physiological disability.* Attention paid to his depressive reaction may be rehabilitative. (Emphasis added.)

Reviewing the record evidence, I note that Dr. Allen has provided conclusions of disability based on her clinical observations of appellant. She described appellant's "uncontrollable coughs". In view of these conclusions it is significant that no such occurrences in the work place were reported by appellant, his co-workers, or supervisors. Reports of physical findings, tests, or other objectively verifiable medical evidence were not provided to support her observations. If it was the case that no such evidence is ever available in such a case, then a competent medical finding stating that conclusion was required but not provided.

Based on Dr. Epstein's report, it is apparent that such tests and other objective indicia of the disabling bronchial condition are susceptible of ascertainment. Dr. Epstein reviewed test and physical findings and noted "no evidence of either restrictive or obstructive disease" and that appellant's subjective symptoms were disproportionate to cited objective findings.

In light of the lack of evidence of observed symptoms by others and Dr. Epstein's conclusion supported as they were by the cited findings, I conclude that his conclusions are entitled to more weight than Dr. Allen's. In reaching this conclusion I am not unmindful of the length of time of patient relationship between Dr. Allen and appellant. I have also considered that Dr. Smith's opinion, although not based on a physical examination, was entitled to some weight since it was based on a professed review of the record assembled to that time.

I have not entirely discounted Dr. Williams' opinion of appellant's condition in early 1978 regarding the chronic bronchitis, but conclude that the tentative character of his conclusion, "probably disabled," in the absence of cited pos-

itive, objective physical findings, diminishes the weight to be ascribed to it. Furthermore, Dr. Levine's conclusion based on his review of tests and stated data are consonant with those of Dr. Epstein, and provide persuasive rebuttal to Dr. Williams.

Having heard, read and considered the record evidence, I find that appellant has not established by a preponderance of the evidence that he has a disease or injury which renders him totally disabled for useful and efficient service in his last occupied position. Accordingly, I conclude that he is not entitled to disability retirement pursuant to 5 U.S.C. 8337.

DECISION

The December 4, 1980, decision of the Office of Personnel Management which denied appellant's application is hereby affirmed.

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on June 12, 1981 unless a petition for review is filed with the Board within 35 calendar days of issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management and the Special Counsel may file a petition for review of this initial decision with the Merit Systems Protection Board. The petition shall set forth objections to this decision, supported by references to applicable laws or regulations, and with specific reference to the record.

The petition for review must be filed with the Secretary to the Merit Systems Protection Board, 1717 H Street, N.W., Washington, D.C. 20419.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation.

The Director of OPM may file a request for review only if he/she is of the opinion that the decision is erroneous and will have substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office. 5 U.S.C. 7701(e)(2).

Under 5 USC 7703(b)(1), the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board, provided the petition is filed no more than thirty (30) calendar days after receipt.

FOR THE BOARD:

/s/ Philip L. Arnaudo

PHILIP L. ARNAUDO
Presiding Official

IN THE UNITED STATES COURT OF CLAIMS

Ct. Cls. No. Appeal 39-81
WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT

PETITION FOR REVIEW FILED JUNE 10, 1981 TO THE UNITED STATES COURT OF CLAIMS:

The Plaintiff respectfully alleges as follows:

STATEMENT OF FACTS

1. WAYNE LINDAHL (hereinafter referred to as 'Lindahl') is a citizen of the United States, currently a civilian, residing at 2685 Magee Avenue, San Pablo, California, 94806.

2. On January 25, 1968 Lindahl commenced working for the United States government as a career-conditional appointee, at Mare Island Naval Shipyard, Vallejo, California.

3. On June 21, 1970 Lindahl was promoted to the Naval Support Activity as a guard (GS-5).

4. On January 25, 1971 Lindahl was converted to career tenure.

5. In June, 1976, Lindahl began to have recurrent episodes of acute and chronic bronchitis.

6. On February 21, 1978 Lindahl applied for total disability retirement due to chronic bronchitis. It was denied by the U.S. Civil Service Commission on October 17, 1978.

7. On September 4, 1979 Lindahl was notified of an intent to separate him from his duties as a security officer due to the fact that his physical condition disabled him to such an extent that he was unable to perform the full range of duties as a security officer.

8. On September 5, 1979 Lindahl filed an application for employee disability retirement due to the pulmonary condition.

9. On October 5, 1979 Lindahl was separated from the Naval Support Activity, Mare Island, Vallejo, California

while his application for disability retirement was being processed.

10. On April 8, 1980 the application for disability retirement was denied. A request for reconsideration was denied on December 4, 1980.

11. On March 20, 1981 a hearing was held before the Merit Systems Protection Board, San Francisco, California. Four witnesses, Lee Lofton, Lawrence Hodges, Roy C. Nieman, and John Szalon all testified that Lindahl was not able to carry out his duties due to a severe case of bronchitis.

12. Other evidence considered included statements of Lindahl about his condition and medical reports of Beverly Allen, M.D., John Williams, F. Epstein, Gerald Levine, M.D. The latter two were hearsay documents based on short cursory examinations, and the two witnesses were not subject to cross-examination.

13. On May 8, 1981 the Merit Systems Protection Board denied Lindahl's appeal. They placed the burden of proving that the decision of the Department of the Navy was not supported by a preponderance of the evidence upon Lindahl. This is in clear violation of 5 United States Code, Section 7701(c)(1)(B) and 5 C.F.R. Section 1201.56(a) and caused specific harm to Lindahl.

Also the decision was based on the hearsay reports of Dr. Levine and Dr. Epstein. Lindahl received notification of the decision on May 11, 1981.

ALLEGATIONS SUPPORTING RELIEF

14. The decision of the Merit Systems Protection Board was invalid because it misconstrued specific Congressional Legislation regarding the burden of proof.

15. The hearing conducted by the Merit Systems Protection Board resulted in substantial error going to the very heart of the administrative hearing because it considered illegal evidence, namely the written reports of Dr. Epstein and Dr. Levine, ignored all of the other substantial evidence showing the disability of Lindahl, and denied the right to cross-examination of government witnesses.

16. The action of the Department of the Navy violated procedural due process in violation of its own regulations and that of the United States Executive Department regarding termination of Lindahl.

CITATION OF STATUTES REGULATIONS, AND ORDERS

17. 28USC 1491, which empowers this court to render judgement upon a claim against the United States founded upon the Constitution, Acts of Congress or Regulations of the Executive Department for damges.

18. 5USC 7703 and 5USC 8347 which empowers the Court of Claims to review final decisions of the Merit Systems Protection Board.

19. 5USC 7701 and 5CFR 1201.56 which sets the standard for burden of proof in cases before the Merit Systems Protection Board.

20. 5USC 8337, which provides the criteria for disability retirement.

21. Federal Personal Manual Sections and Naval Regulations which state the procedure for processing terminations and applications for disability retirement.

DEMAND FOR JUDGEMENT

22. In that Lindahl was wrongly denied his retirement disability, by denial of procedural rights, misconstruction of legislation, and errors going to the heart of the administrative determination, Lindahl requests that judgement be entered in his favor for any amounts due him pusuant to Rule 131 of the Rules of Court and that he be declared eligible for disability retirement.

/s/ John Murcko

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Dated: June 8, 1981

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL COURT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

DECIDED: September 22, 1983

Before the court In Banc.
MARKEY, *Chief Judge.*

Petitioner Lindahl appeals from a decision of the Merit Systems Protection Board (MSPB) affirming the denial by the Office of Personnel Management (OPM) of his request for a disability annuity. We order dismissal of the appeal for lack of jurisdiction.

BACKGROUND

On September 5, 1978, Lindahl elected to retire, on the basis of disability, from his civilian employment with the United States Navy. On September 25, 1979, the Navy notified him that he would be separated for physical disability. He accepted the disability separation but claimed an annuity. On March 21, 1980, OPM's denial of the annuity was affirmed in a comprehensive opinion, No. SF 831L8110492, in which MSPB pointed out that the degree of disability required for voluntary separation is less than that required for entitlement to an annuity, and that Lindahl was not disabled to the extent required for an annuity. Lindahl filed an appeal in the Court of Claims, on June 10, 1981, and the case was transferred to this court on 1 October 1982 in accord with the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25.

The government moved to dismiss, citing as alternate grounds: (1) judicial review is precluded by 5 U.S.C.

§ 8347(c); (2) jurisdiction is lacking under 5 U.S.C. § 7703 because Lindahl is not an "employee". Because we dismiss on (1), we need not and do not in this case determine the meaning or scope of the word "employee" in § 7703.

OPINION

Judicial Review is Precluded by 5 U.S.C. § 8347(c)

Congress established a retirement system for federal employees. 5 U.S.C. § 8337. The right to retirement per se, or to a retirement annuity is not founded in the Constitution. The rights created having their genesis in a statute, Congress was at liberty, *Dismuke* v. *United States*, 297 U.S. 167, 172 (1936), to establish a statutory scheme in which the decisions governing eligibility for disability retirement and annuities would be made entirely within the administrative process. Congress was further at liberty to amend that scheme to provide a review step within the administrative process, and to provide for judicial review of one type of such decisions.

Congress did precisely that, the amended statutory scheme being set forth in the current statute at 5 U.S.C. § 8347(c) and (d):

> (c) The Office [OPM] shall determine questions of disability and dependency arising under this subchapter. *Except to the extent provided under subsection (d) of this section*, the decisions of the Office concerning these matters are final and conclusive and are not subject to review. The Office may direct at any time such medical or other examinations as it considers necessary to determine the facts concerning disability or dependency of an individual receiving or applying for annuity under this subchapter. The Office may suspend or deny annuity for failure to submit to examination.
>
> (d) (1) *Subject to paragraph (2) of this subsection*, an administrative action or order affecting the rights or interests of an individual or of the United States under this subchapter may be appealed to the Merit Systems Protection Board under procedures prescribed by the Board.
>
> (2) *In the case of any individual found by the Office to be disabled in whole or in part on the basis of the individual's mental condition, and that finding was*

made pursuant to an application by an agency for purposes of disability retirement under section 8377(d) of this title, the procedures under section 7701 of this title shall apply and the decision of the Board shall be subject to judicial review under section 7703 of this title.

The emphasized matter is that added in 1980 by Pub. L. No. 96-500, 94 Stat. 2696.

The parties' briefs and arguments do not note that the OPM decision in this case was rendered before the January 1, 1981 effective date of the 1980 amendment. When the OPM decision was rendered, sections 8347(c) and (d) were as above quoted, but without the emphasized matter. We are required, absent manifest injustice, to apply the law as it exists at the time of our deicison. *Bell* v. *New Jersey and Pennsylvania*, 103 S. Ct. 2187, 2199 (1933) (White, J., concurring). In the present case, no such manifest injustice would result, which may account for the parties' discussion of the statute as it was amended in 1980.

We decide here only the question of our jurisdiction to hear the type of appeal before us, i.e., an appeal from an MSPB decision affirming the denial of a claim for annuity following a voluntary physical disability retirement, a decision reached by MSPB under the authority provided it in § 8347(d)(1). In such cases, the initial decision is that of the employee who has elected to retire, and who has asserted disability as the reason, and who as then sought an annuity.

Lindahl here seeks judicial review of MSPB's decision on the "question" of his disability as entitling him to an annuity. The so-called "finality clause" in § 8347(c) states unequivocally and unambiguously that administrative decisions on questions of disability "are final and conclusive and are not subject to review". It is difficult to conceive of a more clear-cut statement of congressional intent to preclude review than one in which the concept of finality is thrice repeated in a single sentence.

The finality clause first appeared, in relation to survivorship benefits, in 5 U.S.C. § 724, in 1948. No legislative history existed in relation to that section, and none is needed in view of its continued unambiguous nature. In 1956, as

codified at 5 U.S.C. § 2266(c), the preclusion of review was extended to include disability cases.

Subsequent legislative enactments and court decisions dealing with federal employee retirement, as well as those dealing with other rights of federal employees, have resulted in substantial confusion respecting the limited question before us.

Respecting retirement, Congress passed in 1978 an amendment to § 8347, Pub. L. No. 95-454, 92 Stat. 1111, providing for review by MSPB of OPM disability decisions. § 8347(d). By that amendment, Congress continued to limit the enforcement of voluntary disability retirement rights to the administrative process. It nonetheless provided, to an individual dissatisfied with an OPM decision, an appeal to a quasi-judicial tribunal independent of OPM and affording appropriate administrative review procedures.

In the 1978 amendment Congress let stand the provision in § 8347(b) that OPM "shall adjudicate all claims under this chapter". Congress did not specifically spell out in the statute that § 8347(d) was an exception to the finality clause in § 8347(c).

The history of what Congress did, up to and including its adoption of the 1980 amendment indicates its present intent to deny judicial review of MSPB decisions on questions of disability, other than those involved when an agency forces retirement for mental disability. By the language it selected in constructing § 8347, Congress began with a total limitation to the administrative process, topping the process with the decision by the Civil Service Commission (now OPM). In 1978, Congress provided for review of OPM decision, still within the administrative process, by MSPB. In reenacting § 8347(c) without change, Congress thus provided that the review process of § 8347(d) ended at the MSPB level. Until 1980, Congress had at no time specifically granted jurisdiction to any court to review any decision, by either OPM or MSPB, on questions of disability and dependency. Then, in 1980, for the first time, Congress provided for judicial review, but only to individuals forced to retire at the instance of an agency on the basis of the individual's alleged mental condition. In that 1980 amend-

ment, Congress clarified the relationship between § 8347(c) and (d) by inserting in the former "Except to the extent provided under subsection (d)".

Thus, the plain language of the statute, with which we must begin, *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405 (1979), expressly precludes review beyond the administrative process, i.e., it precludes judicial review, of denials of voluntary disability retirement annuity claims such as Lindahl's. An express statutory provision that certain decisions of an administrative agency "are final and conclusive and are not subject to review" should not be interpreted as though it said such decisions "are *not* final and are *not* conclusive and *are* subject to *some judicial* review". Certainly that interpretation should not be adopted after Congress has in the same statute provided that *other* decisions are subject to review. To so read the review-precluding language of the present statute would appear not a judicial act of interpretation but a legislative act of repeal.

Whatever may be said of the finality clause in the abstract, the subsequent actions of the Congress providing specific and particular exceptions to that clause, one administrative, the other judicial, provide compelling evidence of its intent to preclude judicial review of MSPB decisions on voluntary disability retirement claims. Congress having provided for administrative review in §8347(d)(1), the express exclusion of review in § 8347(c) can relate only to judicial review.

Where, as here, Congress has repeatedly revisited the statute, and where, as here, those self-reviews of its earlier handiwork included two in which it has spelled out specific exceptions to its total preclusion of review, and the specific forums for each, it is not within the province of a court to create additional exceptions. Congress has addressed the question of exceptions, has in the 1980 amendment created legislation without ambiguity or inconsistency, has assured uniformity in the retirement law by making certain discrete disability claims decidable exclusively by MSPB and others exclusively reviewable in this court, has dealt with all classes of disability annuity claimants, and has provided

specific means through which each class may pursue claims for annuity. No basis exists on which this court could exercise an assumed power to create some new class of annuity claimants or to design some new procedure that would include a right of such claimants to appeal to this court.

Lindahl is not within the class of claimants to which the right to judicial review of MSPB disability decision is provided by § 8347(d)(2). He cites no constitutional infirmity in the legislation governing disability retirement or in the classifications made in that legislation.

This court's grant of jurisdiction to review MSPB decision is broad but not unlimited. Among the limitations on that grant is necessarily a statute expressly excluding review of certain decision. Such a statute is spelled out in 5 U.S.C. § 8347(c) and (d). The government's motion to dismiss must therefore be granted.[1]

ASSERTED BASES FOR JURISDICTION

As above indicated, legislation creating rights of federal employees, and the legislative history of that legislation, have clouded the search for clarity that is an integral part of the judicial process. Equally well intentioned and careful courts have reached differing conclusions respecting what the intent of Congress was when it enacted and amended § 8347. Intent of Congress being the touchstone in cases of statutory interpretation, we have been cited to a number of bases upon which it might be held that Congress intended this court to exercise a jurisdiction to review MSPB decisions on voluntary disability retirement annuity claims.

(a) *The Scroggins Line of Cases*

In *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968), it was said that the

[1] Lindahl suggests that 28 U.S.C. § 1491 may supply jurisdiction in the Claims Court to determine the question of whether his disability entitles him to an annuity following his voluntary disability retirement, the claim having been denied by OPM and by MSPB after review under § 8347(d)(1). Jurisdiction of the Claims Court being a matter for its decision in the first instance, we need not and do not here respond to Lindahl's suggestion.

finality clause of § 8347(c) meant that "at best, a court can set aside the Commissioner's determination only 'when there has been a substantial departure from important procedural rights, a misconstruction of the governing legislation, or some like error going to the heart of the administrative determination' ".

Though the "procedural departure, legislation misconstruction, or like error" quotation was from *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied* 371 U.S. 936 (1962), it has been labeled the"Scroggins formula", and referred to in: *Polos* v. *United States*, 621 F.2d 385, 391-92 (Ct. C1. 1980); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. C1. 1978); *Allen* v. *United States*, 571 F.2d 14, 17 (Ct. C1. 1978); *McFarland* v. *United States*, 517 F.2d 938, 942-43 (Ct. C1. 1975), *cert. denied*, 423 U.S. 1049 (1976); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. C1. 1968).

The "Scroggins formula", though quoted from *Gaines* in *Scroggins*, had its genesis in *Smith* v. *Dulles*, 236 F.2d 739, 742 (D.C. Cir. 1956), *cert. denied*, 352 U.S. 955 (1956). *Smith* was one of three cases decided on the same day and denying reinstatement, back pay, and declaratory judgements. A footnote in *Smith* traces the "formula" back to *Powell* v. *Brannan*, 196 F.2d 871, 873 (D.C. Cir. 1952), a reduction-in-force case having no relation whatever to retirement. (*See* reference to "decisional leapfrogging" in Griswold, *The Judicial Process*, 28 Rec. A.B. City N.Y. 14, 24-25 (1973)).

Smith, *Gaines*, *Scroggins*, *McGlasson*, and *McFarland* dealt with forced retirements for mental conditions. *Fancher*, *Allen*, and *Polos* dealt with forced retirement for physical disability. No case dealt with a voluntary retirement claim for annuity, and in no case (except in *Allen*, overruled in *Polos*) did application of the "Scroggins formula" result in reversal.

We face here no settled case law. Sections 8347(c) and (d), and the "Scroggins formula" have appeared in the opinions of other courts with varying results, some rejecting it, *see: Campbell* v. *OPM*, 694 F.2d 305 (3d Cir. 1982); *Chase* v. *OPM*, 695 F.2d 790 (4th Cir. 1982); *Morgan* v. *OPM*,

675 F.2d 196 (8th Cir. 1982), some applying it, *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982); *McCard* v. *MSPB*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, No. 82-1436 (D.C. Cir. May 17, 1983); *Pitzak* v. *OPM*, No. 82-1592 (10th Cir. July 14, 1983), and one acccepting it with a limitation, *Lancellotti* v. *OPM*, 704 F.2d 91 (3d Cir. 1983). Our independent consideration has led us to what is in our view the sounder conclusion.

If the cases of our predecessor court referring to the "Scroggins formula" were interpreted as holding that § 8347(c) and (d) leave room for judicial review of voluntary disability retirement annuity claims, those cases to that extent would have to be viewed as wrongly decided and overruled.

The concern that apparently lead to the initial application of the "Scroggins formula" by our predecessor court, i.e., that administrators might unfairly force individuals from federal employment with an attached mental condition "stigma", has been fully met by Congress' enactment of § 8347(d)(2). The cases dealing with that form of retirement are therefore simply no longer viable.

Because all references to the "Scroggins formula" by our predecessor court appear in opinions of that court dealing with forced retirement, the *Scroggins* line of cases cannot serve as a basis for an assertion of jurisdiction to review an MSPB decision on voluntary retirement like that presented here.

(b) *Review of Agency Action*

Treatment of 5 U.S.C. § 8347(c) in the courts since 1956 seems to have been influenced by an apparent tendency to resolve doubt in favor of assuring federal court review of every conceivable objection to agency action. The tendency has on occasion served well the paramount public interest in the administration of justice, and have avoided a slamming of the federal courthouse door in the face of persons entitled to be there. Courts should be equally zealous in avoiding the unauthorized jamming of the courthouse door. Persons entitled to be there are harmed when denied or delayed entry by a crowd which is there not because a

constitutional right is involved, or because a statute provides a right to be there, but only because a court had adopted an overly expansive view of its own jurisdiction.

In the present case, for example, it is nowhere asserted that Congress has ever specifically *granted* jurisdiction to any court to hear appeals from administrative decisions on claims for annuity by those who voluntarily retire. Whatever may be their "traditional powers", all federal courts are courts of limited jurisdiction. It is not within the powers, traditional or otherwise, of federal courts to fill every seeming jurisdictional void they may detect in congressional legislation; but if it were, thre is no void detectable in § 8347(c) and (d).[2]

The Administrative Procedure Act provides for judicial review of agency action, 5 U.S.C. § 704, but specifies that judicial review is *not* available when precluded by statute, 5 U.S.C. § 701(a). In *Dismuke*, 297 U.S. at 172, in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967), and in *Barlow* v. *Collins*, 397 U.S. 159, 166-67 (1970) (quoting *Abbott*), the Supreme Court has erected a presumption of judicial review over agency action. It has, however, been careful in those cases to recognize the right of Congress, within constitutional boundaries, to rely on the administrative process and to preclude judicial review. As above indicated, we hold § 8347(c) an express preclusion of judicial review. Hence the presumption outlined in *Abbott* is inap-

[2] The powers of federal courts have been the subject of controversy since long before those courts were born. There was deep distrust of a federal judicial system in the Constitutional Convention. See Farrand, *The Records of the Federal Convention*, (Rev. Ed. 1937); Prescott, *Drafting the Federal Constitution*, ch. 17 (1941). There was concern that the federal judiciary would find it had jurisdiction to achieve broad purposes of federal statutes. See 3 Elliott, *Debates*, 565. Early on, the Supreme Court held that inferior federal courts received no powers directly from the Cosntitution, but only such authority as may be vested in them by Congress. *Turner* v. *Bank of North-America*, 4 U.S. (4 Dall. 7) (1799); *McIntire* v. *Wood*, 11 U.S. (7 Cranch 503) (1813); *Kendall* v. *United States*, 37 U.S. (12 Pet. 524) (1939); *Cary* v. *Curtis*, 44 U.S. (3 How. 236) (1845), and that for jurisdiction to exist the Constitution must have given the capacity to take it and an act of Congress must have supplied it. *The Mayor* v. *Cooper*, 73 U.S. (6 Wall. 247) (1867).

plicable, and our holding here does not impinge upon or conflict with that presumption.

It is suggested that this court might reconcile the presumption of reviewability with the finality clause of § 8347(c) by noting the inclusion of OPM's fact finding role in that section, and by saying that Congress intended to preclude only a review of OPM's factual determinations. Then, we are asked to say, a claimant for a voluntary disability retirement annuity would retain a "right" to judicial review for a possible procedural or legal error by OPM or MSPB. We decline the suggestion. The question before us is not whether this or that type or breadth of judicial review would be in our lights advisable or appropiate. The question is whether any is authorized.

However attractive may have been the temptation to reconcile the reviewability presumption with § 8347(c) and (d) as they stood before the 1980 amendment, no such reconciliation is now possible. The current statute provides that OPM shall determine "question" of disability and that its "decisions" concerning such matters are reviewable under § 8347(d)(1) only by MSPB. Thus Congress has provided, not precluded, review of OPM's factual determinations. It lodged that function, however, in MSPB. The statute further provides in § 8347(d)(2) for judicial review of particular MSPB decisions, under a particular standard of review found in § 7703. Congress having so divided and allocated the review function between the executive and judicial branches, the courts are not at liberty to reallocate it.

Moreover, the factual determination that a voluntary claimant is not disabled can be expected to control the outcome, as illustrated by the virtually universal denial of relief, even in forced retirement cases, under the judicially crafted "Scroggins" type of review. Nor, the factual determinations being non-reviewable, is relief likely on legal or procedural grounds. As above indicated, one whose application for an annuity is denied after voluntary disability retirement is not by that denial alone deprived of a constitutional right. There being no liberty or fundamental pre-existing property interest at risk, the simplest proce-

dures adopted by the agency will avoid a claim of denial of procedural due process.

It is, of course, possible to posit a scenario in which OPM and MSPB might both act so irresponsibly and arbitrarily as to employ unacceptable interpretations of law, statutes, or regulations, and totally inadequate procedures, for the purpose of denying annuities to those who voluntarily retire. Conjecture cannot alone, however, serve as a grant of jurisdiction. A facile formula based on a fear of faceless functionaries would be such a grant, for the court would have to exercise jurisdiction to determine whether legal or procedural error had occurred. Allegations of procedural error are easily made, as were the assertions here of failure to follow procedures inapplicable to Lindahl.

Whether the supposed scenario is realistic, and whether it be of a nature and breadth to warrant judicial review of all MSPB decisions on all voluntary retirement claims, would be a matter for investigation and legislation (if deemed appropriaate) by the Congress, not the courts.

(c) *5 U.S.C. § 7703 and 28 U.S.C. § 1295*

Lindahl cites the broad provisions for review by this court of what he describes as "any" MSPB decision, and the grant of "exclusive" jurisdiction to this court over appeals from what he calls "all" MSPB decisions in 28 U.S.C. § 1295(a)(9). It is implied that a "conflict" or "anomaly" would somehow arise if, in the light of § 7703, it were held that §§8347(c) and (d) expressly preclude judicial review of voluntary disability retirement claims. We find no basis for that view.

First, retirement benefit claims are not adverse action claims. *Francher* v. *United States*, *supra*, 588 F.2d at 807; *Piccone* v. *United States*, 407 F.2d 866, 872 (Ct. Cl. 1969). No voluntary disability claims have been reviewed under § 7703. Respecting involuntary claims, it was the *Scroggins* line of cases, not § 7703, which was looked to as a basis for jurisdiction.

Second, there is no "conflict" or "anomaly" created when Congress provides different routes and different forums for enforcement of different statutory rights. Indeed, Congress

provided a divergent route in § 7703(b)(2) for a claim that an adverse action was based on discriminaton. Thus an anomaly is avoided, not created, when the court honors the express exception to its § 7703 jurisdiction appearing in § 7703(b)(2) and simultaneously honors the express exception to its § 7703 jurisdiction appearing in §§ 8347(c) and (d).

Third, there are numerous differences between an appeal from OPM's denial of a claim for annuity on voluntary retirement that may be brought to MSPB under § 8347(d)(1), and appeals that may be brought to this court under § 7703. The former may be brought by "individuals"; involve "procedures prescribed" by MSPB; and place the burden on the applicant, *Chavez* v. *OPM*, 6 MSPB 343, 353 (1981). Those differences warrant, if warrant were needed, a difference in congressional treatment.

Fourth, a specific statute dealing with disability claims prevails over a general statute dealing with appeals generally from decision of the MSPB. *HCSC-Laundry* v. *U.S.*, 450 U.S. 1, 6 (1981).

Decisions of MSPB that can be challenged by a *de novo* trial in the district court (i.e., those resolving discrimination claims), and OPM decisions that Congress has specifically said are not reviewable except by MSPB (§§ 8347(c) and (d)(1)(are clearly not encompassed within the words "any" and "all" that were used by some congressmen in discussing the jurisdiction provisions in the FCIA. S. Rep. No. 95-969, 95th Cong., 2d Sess. 62, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2784. It will not do to argue that references by some congressmen to review of "all" MSPB decision by this court resulted in a repeal, *sub-silentio*, of §§ 7703(b)(2) and 8347(c). Repeal of a statute should never be assumed. *Allen* v. *McCurry*, 449 U.S. 90, 99 (1980).

Quite apart from the presence of §§ 7703(b)(2) and 8347(c) and (d), it is not true that Congress made "all" MSPB decisions appealable to this court. In 28 U.S.C. § 1295(a)(9), Congress provided this court with a jurisdiction over MSPB decisions different from that previously provided the Court of Claims and the regional Circuit Courts of Appeals. As discussed in *Lancellotti* v. *OPM*,

supra, 704 F.2d at 97-99, those courts had been stated to have jurisdiction over "*all final orders* of the Merit Systems Protection Board" except those in § 7702(b)(2) cases. 28 U.S.C. § 2342(6) (Supp. IV 1980). In contrast, the FCIA makes the jurisdiction of this court applicable to appeals "pursuant to sections 7703(b)(1) and 7703(d) of title 5". Appeals of MSPB decision under 5 U.S.C. § 1207 are directed to the regional circuits, not to this court. There is no appeal, even to the MSPB, under 5 U.S.C. § 3592.

As complicated and complex as the Civil Service Reform Act is, it is at least clear, when §§ 7703(b)(1) and 7703(d) are read in context, that among the final orders and decisiosn of the MSPB appealable to this court are those under § 7703(a)(1). Section 7703(a)(1), as applicable to this court, encompasses MSPB original jurisdictional cases and appeals properly brought to the MSPB under § 7701. Section 7701 itself encompasses agency decisions either specifically designated by the statute as appealable to MSPB under § 7701, e.g., 5 U.S.C. §§ 3593(c)(2); 3595(c); 7543(d); and 8347(d)(2); or those so designated by "rule or regulation".

The provision governing MSPB's jurisdiction, 5 U.S.C. § 7701, raises no conflict with our adherence to the statutory preclusion of judicial review present in §§ 8347(c) and (d). In connection with appeals to MSPB like Lindahl's, MSPB has by regulation elected to employ § 7701 procedures. *See* 5 CFR § 1201.3(a)(6). The question of whether MSPB correctly employs § 7701 procedures in exercising its review authority of particular agency decisions under § 8347(d)(1), however, is not before us. An MSPB election to treat its review authority under § 8347(d)(1) as permitting use of § 7701 procedures cannot constitute a grant of jurisdiction to this court to review all decisions MSPB reaches under § 8347(d)(1). *Schwartz* v. *Department of Transportation*, No. 83-768 (Fed. Cir. Aug. 23, 1983). Nor can that election work a repeal of § 8347(c). Nor is there reason to suppose that MSPB authority to render decisions and this court's jurisdiction to review MSPB decisions must be identical or coextensive.

To hold that judicial review of all § 8347(d)(1) decisions had all along been available under § 7703, would be to render superfluous Congress' action in § 8347(d)(2), making judicial review available for particular claims under § 7703.

We need not, and hence do not, decide in this case whether all decisions of MSPB under § 7347(d)(1) are denied judicial review by § 8347(c). If § 8347(c) is to have any meaning, there must be some decision of OPM that are final and conclusive and not reviewable except by MSPB under § 8347(d)(1). It is enough to hold, as we do, that § 7703 does not make MSPB decisions on voluntary disability retirement claims appealable, either by claimants or by OPM, to this court.

(d) *The 1980 Amendment*

It is suggested that Congress knew of *Scroggins* at the time of the 1980 amendment, and that it effectively ratified judicial review under the limited "Scroggins formula", because it did not specifically say it was not doing so. We are cited to statements of congressmen mentioning *Scroggins*, H.R. Rep. No. 96-1080, 96th Cong., 2d Sess. 3 (1980), and to contrary statements of other congressmen who thought that all judicial review was precluded by § 8347(c). S. Rep. No. 96-1004, 96th Cong., 2d Sess. 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News 5986, 5987; H.R. Rep. No. 96-1080, *supra*, at 4. Though OPM's director could not express the intent of Cognress, we are cited to a letter from him in which he acknowledged existence of the review referred to in *Scroggins*. H.R. Rep. No. 96-1080, *supra*, at 8-10. The legislative history contains no statement of the "formula", no recognition that the "formula" had been mentioned in forced retirement cases, and no express acknowledgement that the "formula" had resulted in virtually no reversals of the decisions reached in the administrative process.

We find no support for the view that the 1980 amendment merely expanded the "breadth" of review, in cases of forced retirement on mental condition, beyond the "limited" review said to be available for such cases in *Scroggins*. If that were true, it would, as above indicated, merely re-

move the viability of *Scroggins*. It would not establish that judicially created and judicially limited review had existed for other types of cases, such as the voluntary retirement type presented here. What did not properly exist cannot be expanded.

It is one thing to say on a particular record that Congress had incorporated the judicial "gloss" placed on a statute. It is another to say that a court's departure from an express preclusion of review is adopted unless Congress in reenacting the preclusion verbatim specifically adds "we meant what we said the first time". Whether a court may require Congress to specifically disallow review the court had "allowed" is not here a relevant consideration. In § 8347(d)(2) Congress not only allowed but legitimized judicial review in the type of case in which our predecessor court had said it was appropriate, while simultaneously reenacting the express review preclusion in § 8347(c) and making plain that §§ 8347(d)(1) and (d)(2) were exceptions to that preclusion.

That some congressmen and the director of OPM referred to the existence of a court-designed review formula, or that some congressmen said the law was not being changed, or that some criticized *Scroggins*, or that some said § 8347(c) barred all judicial review, cannot be controlling. We look not to conflicting comments of a few congressmen, but to what Congress did. What it did in 1980, as above indicated, was to add an *exception* to its prohibition of review in disability cases, and allowed judicial review when the government orders retirement for mental disability. What it did was to leave § 8347(c) and its finality clause untouched. The "law" that Congress did not change in 1980 was the law Congress enacted in § 8347(c) and never repealed.

CONCLUSION

A Congress frequently criticized for vastly increasing the jurisdiction of the federal courts, with insufficient concern for the impact of its legislation on those institutions, has enacted an employee retirement scheme which relies on the administrative process, and in 5 U.S.C. § 8347(c) and (d)(1)

excludes the courts from review of administrative decisions in at least those cases involving voluntary claims for disability annuities. That effective congressional solicitude for crowded court dockets, and for the effect of that crowding on deserving litigants, deprives no one of any constitutional or statutory right.

The statute, 5 U.S.C. § 8347(c) and (d), is clear and unambiguous. Whether the finality clause of § 8347(c) should have been from the outset honored by judicial recognition that jurisdiction was lacking is academic. Today this court applies to the case before it the statute as written.

ORDER

It is ordered that respondent's motion to dismiss for lack of jurisdiction be and it is hereby granted.

DISMISSED

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

APPEAL NO. 39-81

NICHOLS, *Circuit Judge*, concurring.

I agree with the judgment and join in it. Chief Judge Markey's able opinion I join in except where it is inconsistent with what follows.

First, I believe it is ill-advised to limit our holding to applicants for disability annuity who have themselves voluntarily retired from active employment because of disability. (a) The statutory preclusion of judicial review, relied on by the court, 5 U.S.C. § 8347(c), itself draws no such distinction, except in the category, not here involved, of involuntary retirement for mental disability. For this court to draw one belies our own conclusion that preclusion statutes mean what they say. (b) The distinction we draw will have unfortunate consequences in that persons of marginal disability will hang in and insist on involuntary retirement so as to safeguard their annuity rights, to the detriment of the federal service, and (c) the factual basis of the statement that Mr. Lindahl is a voluntary retiree is uncertain. It is clear he did not want to be retired except on the condition that he receive the annuity. That is why we have this lawsuit. If he put in an application for retirement that failed to make clear the precondition he had in mind, that may be dispositive of the present case, but only because nobody focused on the voluntary nature of the retirement, as an issue, and nobody took the trouble to clarify the record. Who said what to whom on what date is quite obscure. Nor is it clear whether Mr. Lindahl was adequately warned that by applying as he did, he sacrificed his active duty pay without obtaining assurance as to disability annuity. I would prefer

to assume in favor of Mr. Lindahl that the retirement was involuntary except insofar as he agreed with management that he was in fact disabled, and differentiate the case to that extent only from those in which the much discussed "Scroggins formula" was invented and applied.

The chickens will come home to roost in a whole series of cases in which it will be alleged that the "Scroggins formula" survives and has an area for application, despite the *Lindahl* decision, because the disability retirement was *de jure* involuntary, or actually involuntary in view of the course of discussion of the applicant's physical problems, between him and management.

Second, having noticed and acknowledged that decision of other circuits are in conflict as to whether the "Scroggins formula" undercuts the finality or preclusion language of § 8347(c), the court moves along without stating why the decisions applying the preclusion are preferred over those applying the formula. Though we are now to be, under the Supreme Court, the paramount authority to decide the issue under the Federal Courts Improvement Act of 1982, and none of these decisions bind us, they were rendered by courts having jurisdiction at the time, courts of last recourse as of right. None of the decisions, probably were products of such agonizing introspection as ours will be. None were rendered in banc. It is usual, however, for courts, federal and other, raised under our common law traditions, to regard decisions by other courts of equal authority as part of the problem to be dealt with, to be followed or explained away. I do not think the fact they are in conflict with each other is the only thing about them one need notice. There is a somewhat wooden quality about most of them. Those adhering to the formula adhere also to the often expressed judicial horror of leaving any executive branch decision immune to judicial review, without notice of the fact that this horror is much mitigated when it is a question of a money claim against the United States, as an annuity claim is, even apart from statutory preclusions. *United States* v. *Testan*, 424 U.S. 392 (1976). Those adhering to the preclusion likewise fail to notice how far the horror has often carried other courts, despite other express

and implied statutory preclusions. The proper technique of weighing this horror against a statutory peclusion is a subject nobody seems willing to discuss, and perhaps wisely. I come out with the unsurprising conclusion that the decision I agree with as to result are better considered, and I have at least one articulable reason for this which I will state *infra*.

A third and more serious objection I have to our generally able decision, is that it too ignores the striking contrast the "Scroggins formula" presents to the techniques of our highest court, and other courts, in dealing with "finality language" in other statutory contexts, and alleged to bar or curtail the judicial review that would otherwise occur.

The World War II Renegotiation Acts, 50 U.S.C. app. § 1191 and ff, both contained, originally or as amended, provision (subsection (e) of § 1191) that a party aggrieved by an order to eliminate excessive profits could file a petition with the Tax Court:

> Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency.

In *Lichter* v. *United States*, 334 U.S. 742 (1947), the Supreme Court, though viewing the Tax Court as an administrative agency, upheld the constitutionality of these arrangements as a war measure under the constitutional war power. In *United States* v. *California Eastern Line, Inc.*, 348 U.S. 351 (1955), the Court gave the finality language a literal interpretation, holding it did not extend to questions as to what contracts were renegotiable, even though this necessarily underlay the issue of "amount."

The Renegotiaton Act of March 23, 1951, 50 U.S.C. app. § 1211 and ff, set up a scheme that was similar so far as concerned the role of the Tax Court, and in § 1218 had a similar finality clause. That Act was extended several times regardless of whether the *Lichter* grounds existed, *i.e.*, a state of all-out or total war. The circuits that considered the question refused to hold that any exception existed to the finality language, except review on "constitutional or

jurisdictional grounds." *Consolidated-Hammer Dry Plate & Film Co.* v. *Negotiation Board*, 375 F.2d 591 (7th Cir. 1967); *Boeing Company* v. *Renegotiation Board*, 325 F.2d 885 (9th Cir.), *cert. denied*, 377 U.S. 923 (1963). The rule then was that "amount" determinations, whether they related to fact or law, were reviewable only on "constitutional or jurisdictional" grounds. Whatever that was held not an "amount" determination was reviewable the same as any Tax Court decision by a court of appeals, when it concerned a federal tax. The Seventh Circuit, in its case, considered whether some "amount" holdings were "so arbitrary and capricious as to raise a constitutional issue" and stated they were not, but also said that its review of them was gratuitous. (375 F.2d at 594.)

All this is ancient history as the last extension of the Renegotiation Act has long since expired, but it does throw some light on the technique of applying finality clauses.

Article 76 of the Uniform Code of Military Justice, 10 U.S.C. § 876, provides that court-martial sentences, after proper review by military tribunals are "final and conclusive" and "all action taken pursuant to those proceedings [is] binding upon all * * * courts * * * of the United States * * *." In *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), it is held that this did not necessarily bar an Article III court from intervening by way of habeas corpus, injunction, or back pay suit in case of an unconstitutional or otherwise void court-martial. *United States* v. *Augenblick*, 393 U.S. 348 (1969) previously had reversed two decisions of the former Court of Claims that had sustained collateral attacks on court-materials by way of back pay suits, but paid insufficient respect to the finality language. It seems fair to say the distinguished record of the Court of Claims may have displayed such insufficient respect, not alone in enunciating the "Scroggins formula."

United States v. *Wunderlich*, 342 U.S. 98 (1951) reports an earlier losing encounter by the former Court of Claims with finality language. In that case the issue was the respect to be given to language then standard in government contracts, making decisions of contracting officers final in all cases of disputes with contractors, whether on issues of

fact or of law. The Court of Claims by long and generally accepted practice had read into this language an implied exception for decision "so grossly erroneous as to imply bad faith," *e.g.*, *Levering & Garrigues Co.* v. *United States*, 71 Ct. Cl. 739 (1931). The Supreme Court, in a decision that caused many tremors, held that the only permissible exception was actual fraud. Congress, by statute, reinstated the previous rule. 41 U.S.C. § 321, 322. See history of this issue in *Hoel-Steffen Construction Co.* v. *United States*, 684 F.2d 843 (Ct. Cl. 1982) in which it is pointed out that there is necessarily a great difference between contract and statutory finality of decision, the former not affecting the waiver of sovereign immunity and consent to be used as the latter often does.

Allowance of disability annuities to war veterans is a case decidedly parallel to the civilian annuities we have to deal with here.

The finality language in 38 U.S.C. § 211 bars judicial review of Veteran Administration decisions concerning veterans' benefits. It is not the same as § 8347(c) inasmuch as it is not limited to issues of disability and dependency and court review is expressly referred to. For whatever the point is worth, it may be noted that the Court of Claims never even in dictum pronounced any "Scroggins formula" type of exception to finality and the complete exclusion of the court from the area is rather assumed than asserted. Cases are, *e.g.*, *Martin* v. *United States*, 197 Ct. Cl. 1062 (1972); *Jennings* v. *United States*, 214 Ct. Cl. 789 (1977); *Jump* v. *United States*, 164 Ct.Cl. 453 (1964). In *Mitchell* v. *United States*, 664 F.2d 265 (Ct. Cl. 1981), *aff'd*, 51 U.S.LW. 4999 (June 27, 1983), the Court of Claims appears to recognize in dictum at 268 that this finality language provides "against any judicial scrutiny at all."

The Supreme Court in *Johnson* v. *Robinson*, 415 U.S. 361 (1974), held that § 211 did not bar judicial consideration as to the constitutional validity of provisions of the laws providing veterans' benefits, a conclusion based on the bare language of § 211 as well as its purposes as shown by legislative history. The decision is not therefore a matter of reading unstated exceptions into the finality language it-

self. Justice Brennan's care in framing the majority opinion so as not to do this is noteworthy.

The Supreme Court handed down in *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) a decision which has a powerful impact upon the matter at hand. It deals with Medicare reimbursement to health care providers. These are in two kinds, Medicare A and B. Medicare A is primarily for hospital care and hospitals are paid by the government through an intermediary. Medicare B is optional for beneficiaries, is primarily for doctors' fees and other nonhospital health care expenses. Annuitants who elect the coverage pay a small amount which entitles them to be reimbursed by the government for payments which they make direct to the providers, or they may assign their claims to providers who collect from the government as assignees. Judicial review in the district courts only under Medicare A is expressly allowed, in cases of dispute as to the compensation allowable to providers. Distinctions are made as to the extent of *administrative review* as to issues of eligibility, and quantum under B. Congress is shown by the legislative history to have omitted Medicare B claims from judicial review because it expected most of them to be too small to take the time of the courts, overlooking that a concern such as *Erika* might be assignee of hundreds of claims and thus have large sums at stake. If Congress had said nothing about review, *Erika* and all other providers could have sued in the Court of Claims under the Tucker Act, 28 U.S.C. § 1491. The Supreme Court held, however, that the fashioning of judicial remedies for the A cases with nonjudicial review in the B cases, implies an intent that this is to be all. Such an implication is drawn from the bare text even before it is confirmed by the legislative history, showing the reason for the difference as stated above.

Thus there can be implied preclusions of judicial review where the finality of the administrative decision is made just as absolute as when the preclusion is express. The reversed decision below, *Erika, Inc.* v. *United States*, 634 F.2d 580, 587 (Ct. Cl. 1980), undertook to use the "Scroggins formula," urging in support of its position that the "Formula" cases, several of which it cited, showed that

even an express preclusion allowed its exceptions though unrecognized in the statute itself; still more then would this be true of a merely implied preclusion. In *Erika* the Supreme Court teaches that express and implied preclusions are equally effective.

Congress has stated the same view. 5 U.S.C. § 702, Pub. L. No. 94-574, Act of October 21, 1976, is a broad waiver of sovereign immunity and consent to be sued in the federal courts in cases "seeking relief other than money damages." It provides that it does not "affect other limitations on judicial review" or confer "authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief that is sought." The legislative history, H. Rep. No. 94-1656, 5 U.S. Code Cong. & Adm. News, 94th Cong. 2d Sess. 1976, shows that Congress considers a statute impliedly precludes judicial review if it contains any "implied preclusions" and description of one method of review impliedly precludes other methods. By this reasoning, the provision in § 8347(d) for judicial review of involuntary disability retirements for mental condition would preclude judicial review of ther disability retirement decisions even without the finality language in § 8347(c). Congress has put two locks on the door.

The circuit court decision adopting the "Scroggins formula" in their decision, relied on by the dissent herewith, in my view reveal how ill considered they are by their failure to deal with *Erika*. The OPM rightly relies on *Erika* as the strongest kind of Supreme Court support for its motion, citing it five times in its initial brief. Yet our majority opinion ignores *Erika* for reasons unfathomable by me.

In *Erika* we have the same court that first employed the "Scroggins formula" to undercut statutory finality, or express preclusion of judicial review, then for the first time after many years, proposing to extend the formula to another statutory preclusion, this time an implied one. At least I suppose that was the intent, though this was not expressly stated. The Supreme Court shoots this aircraft down in flames. If the formula still stands in the area of disability retirement, it stands as an odd anomaly which may not be, and never has been, extended to parallel situations.

The law normally dislikes oddities of that kind, but seeks to regularize and harmonize. One is reminded of the rule once enforced by Chief Justice Rugg upon the Massachusetts Supreme Judicial Court that it was never to overrule a decision of its own that on later reflection it perceived to be erroneous. It was only to restrict the disfavored precedent "to its own peculiar facts," a signal to the bar never to cite the case again.

The technique of applying a statutory preclusion of judicial review is not, however, the simple open-and-shut or black-and-white issue it is perceived to be in the able majority opinion. As stated by Justice Brandeis years ago, *Lynch* v. *United States*, 292 U.S. 571, 586 (1934), a statute denying a constitutional right will not be read as a preclusion to save its constitutionality, but will only be so read if the language of Congress is unequivocal and no other interpretation is possible. This will rarely occur. The apparently flat and sweeping preclusion of § 876 of the Uniform Code of Military Justice is read in *Schlesinger* v. *Councilman*, *supra*, as allowing all sorts of collateral attacks in civilian courts if an alleged constitutional violation is grave enough or if the court-martial decision is simply void. (As to what is or was a void court-martial *see* II *Court of Claims History* (1978) at 49.) This result is much aided by the legislative history showing that the language was never expected to be a barrier to habeas corpus in appropriate cases. In *Johnson* v. *Robinson*, *supra*, recourse is had to legislative history material to show that, despite sweeping language, preclusion of inquiry by a court as to the constitutionality of a statutory provision affecting veterans' rights was not intended.

United States v. *California Eastern Line, Inc.*, *supra*, shows a technique of literal construction of a statutory preclusion to save judicial review. Thus a preclusion of review as to "amount" of excessive profits determined in renegotiation is held not to preclude review as to what contracts are renegotiable, though the answer will govern "amount." In *Polos* v. *United States*, 621 F.2d 385, 391-92 (Ct. Cl. 1980), the suggestion is made or implied that the decisions as to disability and dependency, given finality by

§ 8347(c), are decisions as to question of fact, whereas the questions saved for judicial review by the "Scroggins formula" are questions of law. The idea is spelled out more expressly in *Lancellotti* v. *OPM*, 704 F.2d 91 (3d Cir. 1983). That case identifies a situation where "disability" *vel non* depends on the answer to a legal question: construction of a statutory provision for termination of status as a disability annuitant upon one's reaching a specified level of income from wages or self-employment.

This kind of reasoning certainly echoes that found in the Supreme Court precedents in their technique of construing statutory finality clauses. However, I do not think it is valid here because it deals with only one of what I have called double locks: the express preclusion but not the implied one. The interpretation of the decision given finality in § 8347(c) as those establishing facts only is possible but not required by the language of § 8347(c) standing alone, and is contradicted by the implied preclusion in § 8347(d), with the cross-reference from (c) to (d) added in 1980.

Mr. Lindahl's principal complaint of the MSPB decision is that it misallocated the burden of proof which he says should have been placed on the OPM, not on him. He next says it was a violation of "due process" to discharge him while his application to the OPM for disability retirement was pending undecided. This appears to be actually a complaint of failure to follow a governing regulation. Thirdly, he says the decision of the MSPB that he was not disabled is unsupported by substantial evidence. The first two issues would arguably be saved from dismissal by the "Scroggins formula" which he invokes, but not if it is repudiated as a rule of decision in this court, as I favor. The third issue is not possibly saved for him even by the "Scroggins formula" since that formula does not provide for substantial evidence review. The dissent therefore should concede dismissal of that issue, to be consistent with the formula.

In summary, my conclusion is that preclusion of judicial review is never absolute in life, but at the Supreme Court level review has never been practiced in defiance of preclusions as much as the "Scroggins formula" would require. The formula is at best a peculiar anomaly invoked in but

one class of case. Virtually it is an invitation to counsel to litigate any issue of statutory construction or interpretation of a regulation. As the Chief Judge writes, it was born of a judicial reluctance to be wholly bound from review of involuntary disability retirement cases where a desk official was given unregulated and unrestricted power to brand a resisting civil servant as mentally disabled. This situation is fully taken care of in § 8347(d)(2) and all other disability retirement rulings under § 8347(c) are at any rate subject to independent due process review by a quasi-judicial body that seems as well suited to perform the task, as the Tax Court was for renegotiations. Now the "Scroggins formula" remains to clutter and confuse the law in cases for which it was not devised, one that invites litigation in an area where Congress wished it not to be. We should, however, be more careful than the majority is not to commit us by dictum to extend the preclusion to instances of unconstitutional and void determinations where Congress could not reasonably, in the light of history, have expected the preclusion to be effective.

I would grant the motion as to all issues briefed for review by Mr. Lindahl.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

NIES, *Circuit Judge*, concurring.

I join in the opinion of the majority but I do so, in part, because of the issues raised by Lindahl's petition for review which are not discussed in the other opinions. Lindahl seeks judicial review essentially of two issues: (1) the fact of his disability and (2) the failure of the MSPB to impose the burden of proof on OPM as required by 5 U.S.C. § 7701(c). The "question of disability" is clearly precluded by 5 U.S.C. § 8347(c) from judicial review. I do not agree, if the majority so holds, that all aspects of the disability claim are precluded from judicial review, although the claimant would have to seek relief through a different forum since our appellate review is limited to involuntary mental disability cases.

The second argument merely illustrates the error of the MSPB in attempting to force all disability claims into § 7701. MSPB admittedly does not follow § 7701 in a case such as this one. However, a statutorily imposed burden of proof cannot be conveniently ignored.

Since the thrust of appellant's petition is to obtain judicial review of the fact of his disability, I would not transfer the case to the United States Claims Court, as appellant asks. Judicial review of that question is precluded.

UNITED STATES COURT OF APPEALS
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Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

DAVIS, *Circuit Judge, with whom* FRIEDMAN, KASHIWA and SMITH, *Circuit Judges*, join, dissenting.

In my view the 1980 amendment of 5 U.S.C. § 8347 did not lessen or abolish the very narrow judicial review that has been accorded to disability retirement matters at least since 1956.[1] The legislative objective, rather, was to *expand* judicial review in the special area of involuntary mental-disability-retirement. I join, therefore, with the several courts of appeals that have come to the same conclusion. *Parodi* v. *MSPB*, 690 F.2d 731 (9th Cir. 1982); *Mccard* v. *United States*, 702 F.2d 978 (11th Cir. 1983); *Turner* v. *OPM*, (D.C. Cir., May 17, 1983); *Pitzak* v. *Office of Personnel Management*, No. 82-1592, (10th Cir., July 14, 1983); *see also Lancellotti* v. *OPM*, 704 F.2d 91

[1] See *Elmore* v. *Bruckner*, 236 F.2d 734, 736-37 (D.C. Cir.), *cert. denied*, 352 U.S. 555 (1956); *Murphy* v. *Wilson*, 236 F.2d 737 (D.C. Cir. 1956); *Smith* v. *Dulles*, 236 F.2d 739, 740, 742 (D.C. Cir.), *cert. denied*, 352 U.S. 955 (1956); *Gaines* v. *United States*, 158 Ct. Cl. 497, 502, *cert. denied*, 371 U.S. 936 (1962); *Scroggins* v. *United States*, 397 F.2d 295, 297 (Ct. Cl.), *cert. denied*, 393 U.S. 952 (1968); *McGlasson* v. *United States*, 397 F.2d 303, 307 (Ct. Cl.1968); *McFarland* v. *United States*, 517 F.2d 938, 942-3 (Ct. Cl. 1975), *cert. denied*, 423 U.S. 1049 (1976); *Allen* v. *United States*, 571 F.2d 1411 (Ct. Cl. 1978); *Fancher* v. *United States*, 588 F.2d 803, 806 (Ct. Cl. 1978); *Polos* v. *United States*, 621 F.2d 385, 391-2 (Ct. Cl. 1980).

(3rd Cir. 1983).[2] Because of these recent opinions, which cover the ground, I shorten my statement.

The core of it is that (a) the standard of narrow judicial review had been utilized for many years when Congress considered the 1980 amendment;[3] (b) Congress was made quite aware of that standard during its consideration of the 1980 amendment; (c) the whole focus of that Congressional consideration was the *over-narrowness* of that standard for involuntary mental disability cases; (d) no one seems to have suggested that, for other types of disability cases, the existing standard should be lessened or all review abolished (indeed, the then Director of OPM expressly told Congress that the prior standard would continue for non-mental disability cases, *see Turner* v. *OPM*, *supra*, slip op. at 9-10); (e) there is nothing in the Committee reports or the floor discussion suggesting that the prior judicial standard was no longer to be followed in the nonmental area; and (f) no change was made in the wording of the "finality" clause (except for the special provision for mental disability and express authorization for review by the MSPB).

In the face of that history, it is hard for me to think that, in explicitly *expanding* review for mental cases, Congress silently withdrew for non-mental cases the limited judicial review that had long been allowed. To paraphrase what the Supreme Court said in *Merrill, Lynch, Pierce, Fenner & Smith* v. *Curran*, 456 U.S. 353, 381-2 (1982) (a recent Supreme Court decision holding that the reenactment and enlargement of another federal statute had incorporated a prior judicial gloss): "it is abundantly clear" that the *Scroggins* standard "was a part of the 'contemporary legal context' in which Congress legislated" in 1980. "In that con-

[2] In *Campbell* v. *OPM*, 694 F.2d 302 (1983), the Third Circuit seemed to view the 1980 amendment as abolishing all judicial review in non-mental disability retirement cases, but the later ruling in *Lancellotti* appears to have qualified *Campbell* by according judicial review to legal rulings bearing on disability retirement pay. 704 F.2d at 96-98.

[3] This standard is often called "*Scroggins*-type" review but it actually goes back about a dozen years before *Scroggins* was decided. *See supra* note 1.

text, the fact that a comprehensive reexamination and significant amendment" of the disability retirement legislation "left intact the statutory provisions under which the federal courts" had developed and used the *Scroggins* standard "is of itself evidence that Congress affirmatively intended to preserve that remedy." When the "finality" language was retained and embodied in the 1980 amendment, that language carried with it the existing judicial interpretation.

By the same token it is improper to decide now (as the majority intimates should be done) that the *Scroggins* reading was incorrect when first adopted in 1956 (and since followed) and should be jettisoned regardless of Congress' position in 1980. Because Congress "affirmatively intended [in 1980] to preserve" that standard we cannot and should not now rule to the contrary.

For these reasons,[4] the motion to dismiss should be denied and petitioner accorded the right to have his claim tested under the so-called *Scroggins* standard.

[4] These reasons apply *a fortiori* to the amendment made by the Civil Service Reform Act of 1978, as to which there is not the slightest indication of any purpose to change the then-existing standard of review.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Appeal No. 39-81

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT, RESPONDENT.

SMITH, *Circuit Judge*, with whom FRIEDMAN, DAVIS, and KASHIWA, *Circuit Judges*, join, dissenting.

I fully join Judge Davis' dissent, but I write separately because I believe it particularly important, at the threshold of this court's existence, to consider the overall statutory structure of the civil service provisions as they relate to this court's appellate jurisdiction. I am especially mindful that, under the Federal Courts Improvement Act of 1982, this court is now the *only* circuit-level forum for petitioners seeking judicial review of most agency actions under the civil service laws. With the majority's result, I fear, we have adopted an unnecessarily cautious and restrictive approach to our nation-wide jurisdiction in this area.

I.

The comprehensive appellate framework established over the considerable period of time between enactment of the Civil Service Reform Act of 1978 and the Federal Courts Improvement Act of 1982—and constructed by more than one Congress—does not present a model of clarity or singularity of purpose. Specifically, the statutory interrelationships are significantly preordained depending upon the section of the code through which one enters in search of the various paths of appeal through this maze. The majority has entered the maze through a portal which mandates a dead end; it errs by failing properly to consider and weigh the merits of the other paths.

A.

Beginning at section 7703(a)(1),[1] which is the jurisdictional provision for the Federal Circuit in the Civil Service Reform Act, this court has exclusive jurisdiction (*see* 28 U.S.C. § 1295(a)(9)) over "*a* final order or decision of the Merit Systems Protection Board" (emphasis supplied). An express exception to this inclusive jurisdiction is for discrimination cases, in section 7703(b)(2). Possible or partial exceptions may also be found in the civil service provisions dealing with review of Special Counsel cases[2] and Senior Executive Service removal.[3] Furthermore, section 7703(d) provides that the director of the Office of Personnel Management (OPM) may petition for review of "*any* final order

[1] All section references are to title 5, U.S.C., except where otherwise indicated.

[2] Sections 1206 and 1207 concern Special Counsel investigations or prohibited personnel practices and hearings and decisions thereon. Section 1206(c) gives the Special Counsel authority to request the MSPB to take action on a prohibited personnel action; § 1206(g) requires the Special Counsel, if it determines that disciplinary action should be taken against an employee, to proceed according to § 1207; § 1206(h) authorizes the Special Counsel to seek corrective action before the MSPB for a pattern of prohibited personnel practices not otherwise appealable to the MSPB under § 7701; and § 1207(c) provides an employee subject to disciplinary action under § 1206(g) with the right to obtain judicial review of a final order of the MSPB in the appropriate regional circuit. I do not attempt to sort out here to which circuit court (this court or regional circuits) appeals for various types of Special Counsel cases go. Suffice it to say, however, that the matter is more complex than the majority, citing § 1207 only, has suggested.

[3] Section 3592, concerning removal from the Senior Executive Service, allows a career appointee to request, in certain circumstances, an informal hearing before an official appointed by the MSPB, but denies that appointee the right to initiate an action with the MSPB under § 7701. The majority summarily concludes from this provision that the career appointee has neither MSPB nor court appeal rights in these circumstances. While this may be correct (*i.e.*, there may not be "a final order" of the MSPB), I am not prepared to so quickly hold without proper examination of congressional intent and the structure of this provision. (For example, §§ 3593 and 3595 authorize career appointees to appeal certain Senior Executive Service reinstatement or reduction-in-force actions under § 7701 to the MSPB.)

or decision of the Board" (emphasis supplied) and that the Federal Circuit may hear any such case.[4]

Section 7703(a)(2) also has implications for the jurisdiction of the MSPB and this court. It differentiates between the procedures to be followed in review of final orders or decisions "issued by the Board under section 7701" and those to be followed in review of other MSPB decisions. *See Phillips* v. *USPS*, 695 F.2d 1389, 1390 n.2 (Fed. Cir. 1982). Thus the MSPB has not one but a plurality of jurisdictional bases for its actions, and it is important to see what each is.

Section 7701(a) is clearly the main basis—it covers in essence all appealable agency adverse actions—and we have held that our jurisdiction of section 7701(a) actions is "plenary." *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1317 (Fed. Cir. 1983). Section 7701(a) is expressly made the jurisdictional basis for actions under sections 4303(e) (actions based on unacceptable performance), 7513(d) (adverse actions taken to promote the efficiency of the service), 7121(e) (grievance procedures), 7543(d) (actions against senior executives), and 3593 and 3595 (reinstatement or reduction in force in the Senior Executive Service). Section 5335(c) (withholding of periodic step increase), though it mentions no jurisdictional basis, has been held to be appealable under section 7701. *Meyer* v. *Department of Health & Human Services*, 666 F.2d 540, 544-45 (Ct. Cl. 1981). Likewise, many actions made appealable to the MSPB by OPM regulation (see section 7701(a), 5 C.F.R. § 1201.3(a)(8)) would be appealed under section 7701, though the regulations do not specifically mention it. *See, e.g.*, 5 C.F.R. § 351.901 (reduction in force); 5 C.F.R. § 300.104(a) (employment practices). Finally, section 8347(d)(2) (OPM mental disability) determinations are expressly reviewed under section 7701(a).

Non-7701(a) cases would include, first, section 7702 (discrimination) cases which do not come to the Federal Circuit at all. Secondly, section 8347(d)(1) (OPM physical disabil-

[4] It seems clear that "a" in § 7703(a)(1) means "any," and so would achieve parallelism with subsection (d)(1). Such interpretation, however, is not necessary to my views.

ity) determinations are also heard by the MSPB, but are either reviewed, as I see it, under *Scroggins* standards, *i.e.*, a lower standard than for section 7701, or, as the majority sees it, not at all, *i.e.*, at *much* lower standard than 7701. Thirdly, those non-7701(a) cases referred to in section 7703(a)(2), then, must include actions pursuant to sections 1206(c) and (h) (special counsel actions) and possibly 3592 (removal from the Senior Executive Service).[5] Finally, MSPB decisions regarding award of attorney's fees under section 7701(g)(1) do not originate in an agency but are nevertheless reviewable by this court. *See, e.g., Sterner* v. *Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983).

To sum up, if one starts with section 7703(a)(1), one finds that this court has jurisdiction of all MSPB decisions except discrimination cases and possibly certain Special Counsel and Senior Executive Service cases. MSPB decisions fall into five categories—section 7701(a), non-7701(a) (*i.e.*, those indicated by section 7703(a)(2)), physical disability determinations, attorney's fees awards, and discrimination—each of which categories has a different (or no) standard of review in this court.

B.

Starting instead at section 7701(a), the provision for MSPB jurisdiction, one immediately notes that its language is as broad as (or broader than) the provision for Federal Circuit jurisdiction in section 7703(a)(1). The MSPB has jurisdiction of "*any* action which is appealable to the Board under *any* law, rule, or regulation" (emphasis supplied). Based on this plain language, the MSPB has taken the position that 7701 is an umbrella provision, encompassing *all* substantive rights to appeal. In other words, all non-discrimination claims are funneled through section 7701 review by the board and thence to the Federal Circuit.

It is tempting to accept this view, for, since we have held that our section 7701(a) review authority is "plenary" (*Rosano*), this view would obviate the need for these many pages attempting to unravel the jurisdictional knot before

[5] *See* notes 2 and 3, *supra*.

us. I agree with the majority, however, that careful statutory construction cannot bring us to such an elegant conclusion. For example, if all review were either under section 7701 or 7702, then section 7703(a)(2) would be meaningless in suggesting non-7701 appeals to the Federal Circuit. Sections 1206, 1207, 3592, and 8347(d)(1), which expressly or apparently provide independent appeal routes to the MSPB, would be overriden.

C.

As to another alternate route, if one begins at section 8347, as the majority does, it seems immediately apparent that section 7701 does not apply to section 8347(d)(1) (physical disability) actions. Legislative history aside, the structure of subsections (c) and (d) makes it plain that a difference in treatment is intended between paragraphs (1) and (2): that MSPB reviews mental disability ((d)(2)) under 7701, while it reviews physical disability ((d)(1)) under (d)(1) itself, with procedures prescribed by the MSPB. There is therefore a conflict here with the plain language of section 7701(a), which covers "*any* action * * * appealable to the Board under *any* law." (Emphasis added.)

Moreover, as the majority discusses, the statute provides that mental disability ((d)(2)) cases are not only to be reviewed by the MSPB under section 7701 but also "shall be subject to judicial review under section 7703." Since this language is absent from the physical disability (d)(1) provision, the majority not unreasonably concludes that Congress meant to deny section 7703 judicial review to (d)(1) physical disability cases. The majority finds conclusive statutory support for this view in the section 8347(c) "finality clause."[6]

Viewed in isolation, then, section 8347 would suggest an appellate structure different from that suggested either by the MSPB or Federal Circuit provisions. Yet, even if one did not question the wisdom of determining overall appel-

[6] So persuasive is the so-called "finality clause" in the majority's view, however, that it proceeds to the next and, to my mind, wholly unnecessary step of abolishing even the long-standing *Scroggins* review. I respectfully part company with the majority at this point.

late structure from a small part of the whole rather than from one of the broader appellate provisions, the conflict remains.

II.

As the foregoing demonstrates, under the civil service laws the appellate structure can be a relative thing. By concentrating on section 8347, the majority has not eliminated or avoided anomaly but has fallen victim to this relativism and explicitly created an anomalous system which, even if it is the best one (which I do not believe), fails to account for the difficulties it engenders.

The most significant anomaly, to my mind, is the conflict between the majority's holding of no review and the plenary authority of the Federal Circuit to review as set out in section 7703(a)(1). Section 7703 contains broad and inclusive language. The Senate Report on the Civil Service Reform Act states that this section "applies to judicial review of *all* final orders or decisions of the Board * * *." S. REP. NO. 969, 95th Cong., 2d Sess. 62, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 2723, 2784 (emphasis supplied). Under the Federal Courts Improvement Act, the *entire* jurisdiction created by section 7703 devolved upon this court. H.R. REP. NO. 312 at 18 ("jurisdicton * * * over *all* appeals from the Merit Sysems Protection Board" (emphasis supplied)); S. REP. NO. 295, 97th Cong., 2d Sess. 21, *reprinted in* 1982 U.S. CODE CONG. & AD. NEWS 11, 31 ("jurisdiction of *any* appeal from a final order or final decision of the Merit Systems Protection Board" (emphasis supplied)). There is absolutely no reason to believe—and numerous reasons to doubt—that Congress intended this court to approach its MSPB jurisdiction with the extreme caution practiced by the majority.

A more particular anomaly is created by the majority with respect to section 7703(d)—OPM petition for review of *any* MSPB decision. I have already noted that the majority too easily implies a total lack of judicial review for voluntary retirees in physical disability cases, notwithstanding the fact that in almost a quarter century of experience under the *Scroggins* formula there has been no jamming of

the courthouse door by the few fingers that have grapsed it. Amazingly enough, the majority also chooses this opportunity to preclude judicial review in these cases for *OPM* as well. This despite the express language of section 7703(d)—"*any* final order or decision"—and the absence in the briefs and arguments of any in-depth discussion of section 7703(d) and its purpose. In order to vest its decision with an aura of consistency the majority not only closes the courthouse door on the fingers of individuals but slams it shut on OPM in 8347(d)(1) cases. Had it not, a reasonable reader of section 7703(d) would be astonished to find that discretionary review of these cases in this court is available to OPM, whereas an individual has *no* review.

While I readily admit that anomalies in this complex area abound, in my view the better approach is, as I explain below, to let stand the limited *Scroggins*-level review for individuals as well as the plain language of section 7703(d) pertaining to OPM review. This approach results in equal if not greater consistency than the majority's all-or-nothing sand, since the level of review OPM may receive in this court parallels that of the individual under *Scroggins*: both aim to catch the worst abuses of the administering agency. *See* S. REP. NO. 969 at 64, 1978 U.S. CODE CONG. & AD. NEWS at 2786.

Another anomaly resulting from the majority's position is that it results in denial of review of a class of persons—"individual[s]" under section 8347(d)(1)—broader than that granted under sections 7703 and 7701—"employee[s] or applicant[s] for employment." At least with the *Scroggins* approach, these "individual[s]" (presumably including at least beneficiaries of employees) receive some type of review, although less than the full 7703 review for "employee[s] or applicant[s] for employment." Anomalies exist either way, but I believe my approach results in less injustice.

Finally, the majority's result is at odds with the broad language of section 7701. Section 7701 covers "any action which is appealable to the Board under any law"; section 8347 fits within "any law." Since all section 7701 actions are

reviewable by this court, a conflict arises, for which, unfortunately, the majority offers unsatisfactory explanation.

III.

Given the opposing yet, when viewed in isolation, reasonable results which obtain when one tackles this statutory construction problem beginning at each of the above three starting points, a thoughtful person might conclude that either result (jurisdiction or no jurisdiction) is proper. However, tipping the scales in favor of at least some sort of review is, in my opinion, the law of the land that, absent clear and convincing evidence of congressional intent to preclude the important right to judicial review, review must be granted. *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140-41 (1967); *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975). When the *Abbott Laboratories* presumption of review is combined with the 1980 activities of Congress in amending section 8347(d), which Judge Davis has succinctly described in his dissent, and the overall appellate framework I have attempted to describe here, I am firmly persuaded that at a minimum Congress intended the *Scroggins*-level of review to apply to physical disability cases. For this court not only to hold, as the majority does, that section 7703 review does not apply here, but to backtrack and eliminate even the barest of *Scroggins*-type review, is an unnecessary abdication of our jurisdictional and statutory responsibilities. The majority's holding, totally barring review in these cases, will apply to all petitioners who would seek circuit court review for, under the Federal Courts Improvement Act, it is only this court to which they may now turn.[7]

[7] Certainly courts should not strain for jurisdiction where it plainly does not exist, but that "canon" loses some strength where there is a long history of *some* jurisdiction. Furthermore, it should not be forgotten that, although the Federal Circuit is not "The Civil Service Court" any more than it is "The Public Contracts Court," or even "The Patent Court," Congress has assembled this bench of judges with broad and diverse backgrounds for the purpose, among others, of establishing as much uniformity as practicable in the civil service area. That legislative policy would be defeated if we choose the path of least jurisdiction when there is no clear mandate to do so. Indeed, there is strong evi-

IV.

I respectfully dissent, and presume to submit the following diagram of the appellate structure created by the Civil Service Reform Act and the Federal Courts Improvement Act, which harmonizes as much as possible all of the provisions of the acts. (To accommodate the majority's position one need only make the dashed lines solid and remove the *Scroggins* and OPM references.) This diagram is, of course, not the definitive word of this court in this complex area, but I hope that it may serve as a useful analytical tool for those entering this maze of appellate jurisdiction.

dence in the legislative history of the Federal Courts Improvement Act that the presumption should be in favor of jurisdiction in those areas where Congress has expressly spoken for and created a court for the purpose of advancing uniformity.

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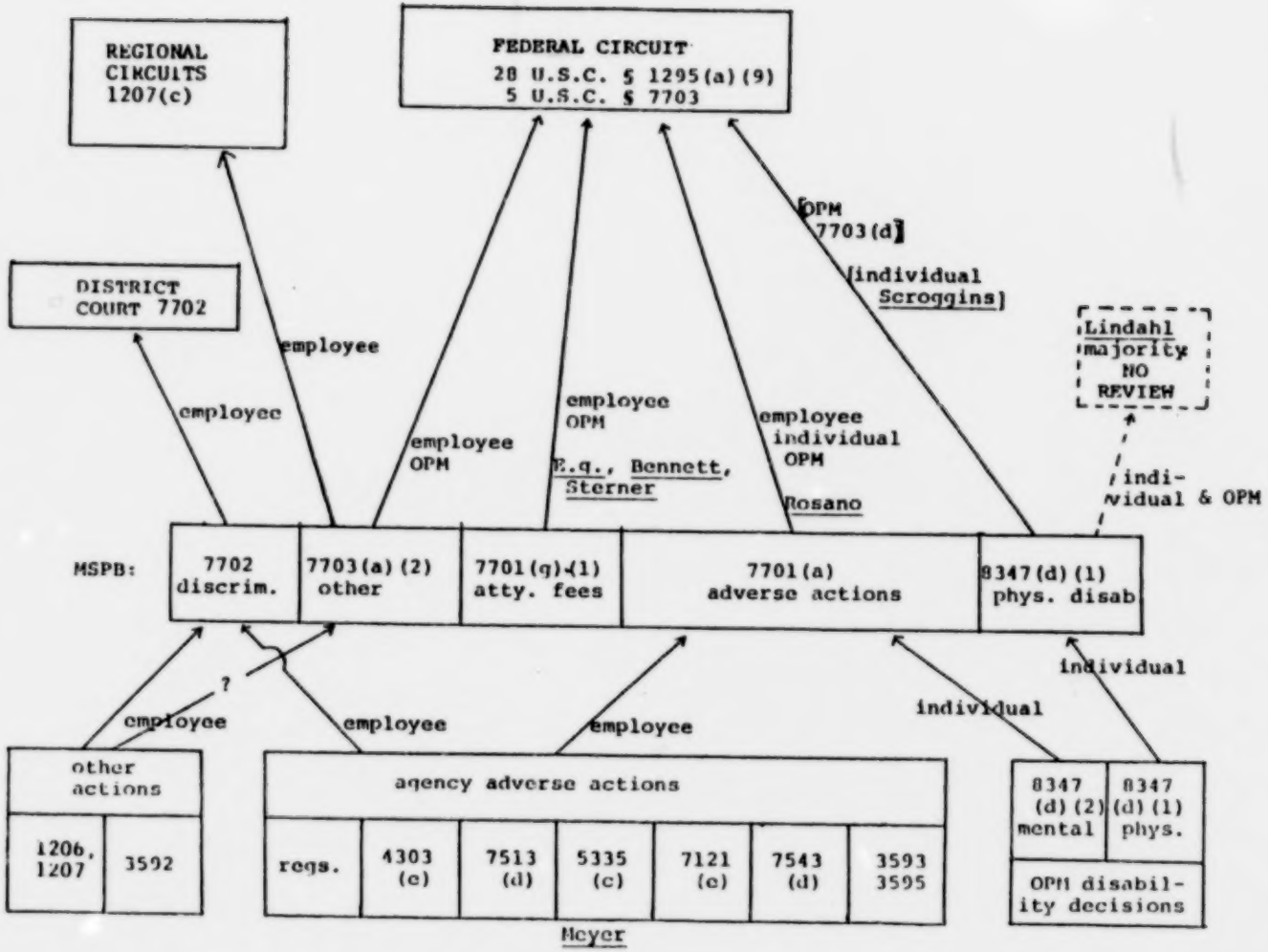

Supreme Court of the United States

No. 83-5954

WAYNE LINDAHL, PETITIONER,

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Federal Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

JUNE 18, 1984